

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

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PEOPLE OF THE STATE OF NEW YORK, BY
LETITIA JAMES, ATTORNEY GENERAL OF THE
STATE OF NEW YORK,
Plaintiff,

- against -

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

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INDEX NO. 451625/20 60 Centre Street
New York, New York
February 25, 2022

BEFORE:

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

APPEARANCES:

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JACK L. MORELLI
Senior Court Reporter

PROCEEDINGS

1 THE COURT: Let's start with appearances
2 beginning with the plaintiff.

3 MS. CONNELL: Monica Connell and Emily Stern, of
4 the New York State Attorney General's Office, for the
5 plaintiff and the Attorney General.

6 THE COURT: For the NRA.

7 MS. EISENBERG: Svetlana Eisenberg, on behalf of
8 of National Rifle Association of America. Good morning.

9 MR. CORRELL: P. Kent Correll, for Wayne
10 LaPierre. Good morning.

11 THE COURT: Mr. Phillips.

12 MR. FARBER: Seth Farber, for Mr. Phillips.

13 THE COURT: Mr. Frazer.

14 MR. FLEMING: William Fleming, for Mr. Frazer.

15 THE COURT: And Mr. Powell.

16 MR. McLISH: Tom McLish for Joshua Powell.

17 THE COURT: We're here on the Attorney General's
18 motion to dismiss counterclaims. I've read the papers but
19 obviously look forward to the argument.

20 So, Ms. Connell or Ms. Stern, whoever is going
21 to take us out. Please proceed.

22 MS. CONNELL: Good morning. Monica Connell,
23 I'll be arguing this motion.

24 Your Honor, we come before you with a motion to
25 dismiss the NRA's amended counterclaims. NRA seeks

- J L M -

PROCEEDINGS

1 extraordinary relief. It asks this Court to foreclose
2 regulatory and actions against it without making the
3 necessary showings to support the same.

4 To just take a step back. NRA is a tax exempt
5 charitable not-for-profit. In exchange for being tax
6 exempt and being able to solicit and collect charitable
7 donations, it has to comply with the laws applicable to
8 not-for-profit entities. There can be no serious question
9 that the NRA has not complied with the laws applicable to
10 not-for-profit entities. Yet, the NRA nevertheless asked
11 this Court to stop the Office of the Attorney General and
12 to stop the plaintiff from prosecuting claims against it
13 based upon its counterclaims.

14 For the reasons in our papers and that I'm about
15 to discuss, the NRA fails and its counterclaims should be
16 dismissed in their entirety, it's respectfully submitted
17 Your Honor.

18 First, Your Honor, the NRA asserts a First
19 Amendment retaliation claim. In order to assert such a
20 claim and plead such a claim and have it go forward, it
21 must sufficiently plead three elements. That it has
22 engaged in First Amendment protected activity. But for
23 that activity it would not have suffered the challenged
24 regulatory or enforcement action. This is a standard set
25 out by the Supreme Court in the case Nieves versus

- J L M -

PROCEEDINGS

1 Bartlett. And third, that the NRA has suffered an
2 actionable injury as a result of the retaliation.

3 THE COURT: As you read that prong, does that
4 mean that the entire action would not have happened or
5 that they have to show the entire action would not have
6 happened or can they do it on a claim by claim basis?

7 MS. CONNELL: I believe, Your Honor, they have
8 to show that the entire action would not have happened.
9 That they cannot do it on a claim by claim basis. I think
10 if there is illegal conduct that's alleged, if a basis for
11 the enforcement proceeding is established, that they can
12 not micromanage the prosecution. The prosecutor has
13 discretion to make decisions as to how to proceed with its
14 case. I would suggest that cases relied upon by the NRA
15 support this proposition.

16 So, for example, the NRA cites to the case
17 People versus Oliver Schools. But in that case, that is
18 cited in actual counterclaims themselves and in their
19 brief, I believe. But in that case the Court supported
20 the discretion that the Attorney General has to seek
21 dissolution of an entity where there is evidence of
22 persistent fraud.

23 People versus Abbott Maintenance Corp., a case
24 quoted at length in Oliver Schools. The Court held that
25 the Attorney General has prosecutorial discretion to seek

- J L M -

PROCEEDINGS

1 dissolution where it deems it appropriate. In that case
2 the Court reversed the dismissal of the dissolution claim.
3 In another case the NRA relies, Leibert versus Clapp. The
4 Court reversed dismissal of a dissolution claim and held
5 that the Attorney General could decide to seek such a
6 claim in light of serious charges of persistent corporate
7 abuses, even though the corporation at that time was still
8 profitable.

9 So, Your Honor, taking a step back I would say
10 that the NRA cannot merely attack one aspect or one type
11 of relief sought, that would be putting precedent on its
12 head. The courts in the decisions cited by both sides
13 demonstrate that the NRA faces a high burden when it asks
14 the Court to permit claims against its regulator to go
15 forward and when asked the Court to stop these claims and
16 it cannot.

17 THE COURT: The argument I guess is, it's not as
18 if these are 16 equally weighted or 18, 17 equally
19 weighted claims where one would say, well, the unjust
20 enrichment is this. And, you know, the dissolution claims
21 they argue and with some force, qualitatively different
22 than any of the other claims. Especially from the
23 perspective of the NRA itself as a defendant, it's part of
24 the claims.

25 MS. CONNELL: That's true. Yet, if we look at

- J L M -

PROCEEDINGS

1 the law here, the law gives the Attorney General a
2 presumption of regularity. There is a presumption that
3 the decisions that a prosecutor or regulator makes are
4 lawful and they are entitled to deference, and the NRA has
5 to overcome that presumption. It has not done so in
6 regard to any of its claims and we have to look at the
7 context here.

8 We're talking about not whether the attorney
9 general has pled a dissolution claim or whether the
10 attorney general will prevail on that dissolution claim,
11 but whether a regulated entity is entitled to come in and
12 prevent a prosecution from seeking certain relief or
13 proceeding with its enforcement action as a whole, which
14 is the relief requested by the NRA in its amended
15 counterclaims. That is not permitted, particularly in the
16 circumstances we are talking about here.

17 We are talking about a complaint and an amended
18 complaint of over 700 paragraphs detailing extensive
19 illegality. We're talking about the NRA's amended
20 counterclaims and its verified pleadings filed so far
21 which admit many of the allegations made by the Attorney
22 General. We're talking about substantial evidence of
23 persistent, long running and broad illegality. Given
24 that, the Attorney General is entitled to ask for
25 dissolution. Whether she ultimately gets it is a separate

- J L M -

PROCEEDINGS

1 question.

2 I would say to the Court that allowing the NRA
3 to move to dismiss on the dissolution claim which assert
4 counterclaims against the Attorney General, because there
5 is a dissolution claim in the complaint, would set some
6 terrible precedent. It would set precedent allowing
7 anyone, any criminal or civil defendant, to come in and
8 try to micromanage or harry prosecutors and government
9 attorneys. It would effectively potentially lessen or
10 perhaps do away with the presumption that government
11 attorneys are accorded in making prosecutorial decisions.
12 Ultimately, it would subject law enforcement to
13 counterclaims for exercises of their discretion. That
14 should not be permitted.

15 I'll note, Your Honor, the NRA hasn't pointed to
16 any extra burden that the dissolution claim has put upon
17 it. There is not extra discovery that has been
18 identified. There is nothing that is in and of itself
19 getting rid of that claim would do except to take off the
20 table one remedy that the Attorney General is entirely
21 permitted to seek and it is within her discretion to seek.

22 I would note, Your Honor, too, that we have a
23 really exceptional set of facts here. We have facts of
24 such ongoing illegality and such broad illegality that
25 continued after the NRA knew it was being investigated and

- J L M -

PROCEEDINGS

1 even after this enforcement action was filed, and there
2 really is no basis for the NRA to seek to assert these
3 claims against the Attorney General, just because they
4 disagree that a dissolution claim is appropriate.

5 So, to take a step back, Your Honor, the First
6 Amendment claim fails because the NRA has not even tried
7 to allege "but for" causation. It fails on all three
8 elements we believe. But I'm going to focus on the "but
9 for" causation, because it has utterly failed. It's pled
10 "but for" causation and that's dispositive of this. The
11 NRA's opposition brief doesn't even cite Nieves versus
12 Bartlett. Instead, the NRA argues that a claim of absence
13 of "but for" causation cannot be discharged or disposed of
14 on a motion to dismiss.

15 THE COURT: Just so I'm clear, just in terms of
16 your broad argument about "but for" causation. If you
17 have, and if you have 30 counterclaims and one of them is
18 unassailably meritorious, does that mean there is that, as
19 a matter of law, that even if the rest of it otherwise
20 fits within the heartland of retaliatory, there is still
21 no claim because some part of the case would have survived
22 even absent retaliation? Is it that black and white?

23 MS. CONNELL: Your Honor, I would say it
24 probably is. But I don't think that's the case that's
25 presented. It's not the case that is presented to the

- J L M -

PROCEEDINGS

1 Court here. The fact is, we have 16 causes of action that
2 the NRA hasn't alleged are unconstitutional and isn't
3 really attacking here. We have certain types of relief
4 that it does not want the Attorney General to seek. I
5 will say that, again, we believe that this is an attack on
6 the discretion afforded to prosecutors and regulators and
7 it should not be permitted. And I can discuss why I think
8 that.

9 THE COURT: No, I was just focusing on, you had
10 mentioned "but for" causation was the element you were
11 looking at and that is a little more divorced from the
12 more substantive arguments that you're making. Because
13 that's almost a mechanical argument that is, as long as
14 one claim survives there can never be this kind of First
15 Amendment claim. And that seems like kind of a broad
16 brush.

17 MS. CONNELL: Let's talk about it in regard to
18 the dissolution claim. Has the NRA alleged, has it
19 properly pled "but for" causation, that "but for" its
20 protected First Amendment activities would it not face
21 dissolution? Has it properly pled that? It hasn't. Look
22 at in its opposition brief, it doesn't try to make that
23 argument because it can't. Instead it argues that a "but
24 for" causation issue cannot be resolved on a motion to
25 dismiss. This is untrue. There are lots of cases that

- J L M -

PROCEEDINGS

1 dismiss First Amendment retaliation claims on a motion to
2 dismiss for failure to set forth sufficient factual
3 allegations of "but for" causation. And this case is one.
4 They haven't even tried to save it. On that ground the
5 First Amendment claim fails.

6 By the way, allegations of improper motive alone
7 cannot raise a plausible claim, a First Amendment claim
8 where there is an obvious alternative explanation for
9 conduct. Here, the Attorney General has laid out what we
10 think are extraordinary allegations of bad faith that have
11 continued. Again, Your Honor, I would note how important
12 that I think that this is. Even after the investigation
13 began; even after the NRA was subject to voluminous press
14 accounts outlining the corruption within it; even after
15 the NRA was subject to an enforcement action; even after,
16 Your Honor, the NRA filed for bankruptcy in a boondoggle
17 that was perpetrated upon by Wayne LaPierre, the NRA has
18 continued business as usual.

19 The NRA cites to other entities that it believes
20 were treated differently. So, for example, it claims that
21 other charities didn't face a dissolution claim even
22 though they were a sham or you have to have a sham to face
23 a dissolution claim. But it hasn't alleged that those
24 entities were similarly situated to the NRA at all. In
25 fact, in those instances that the NRA outlines in its

- J L M -

PROCEEDINGS

1 amended counterclaims and its brief, the alleged
2 wrongdoing was much more narrow and focused in scope;
3 sometimes perpetrated only by one person. The leadership
4 was ousted and the entities settled their case with
5 reforms and other relief sought.

6 That's not what we have here. What we have here
7 is a doubling and tripling down on the conduct. We have
8 an entity that a court in Texas found was seeking to evade
9 regulation, even as it acknowledges that the regulator has
10 identified illegal conduct occurring within the entity.

11 So, Your Honor, I would suggest to you that the
12 question of whether a prosecutor should be permitted to
13 pursue a particular remedy can't be supported or -- a
14 claim based upon that question can't be supported on these
15 pleadings. The NRA has simply not alleged what it must
16 allege to be able to proceed in an action against the
17 Attorney General and in her individual and official
18 capacities.

19 I can go through some of the NRA's admissions; I
20 don't think that I need to. In the interests of the
21 Court's time, which I know that this case takes up quite a
22 bit, I'll move onto its equal protection selective
23 enforcement claim.

24 Your Honor, this claim too the NRA attacks the
25 Attorney General's decision to seek dissolution. But it

- J L M -

PROCEEDINGS

1 also fails to meet its high burden to plead such a claim.
2 The NRA has not overcome the presumption of regularity
3 that we discussed. It has not demonstrated that the
4 Attorney General lacks discretion to seek dissolution
5 where it has alleged pervasive illegality or persistent
6 fraudulent conduct, as the Attorney General has. Nor does
7 merely citing to the Attorney General's political
8 statements and campaign statements alone support an equal
9 protection claim. Nor has the NRA cited or pled, as it
10 must, that a similarly situated entity was treated
11 differently than the NRA has been.

12 Finally, Your Honor, even if the NRA had pled
13 what it must, and it hasn't, the Attorney General's
14 conduct here would survive any applicable scrutiny.

15 I have been through the presumption discussion,
16 I have also demonstrated that cases that the NRA itself
17 relies on demonstrate that the Attorney General has had
18 such discretion to seek dissolution and that it's entitled
19 to a presumption of regularity. But I'll note that the
20 NRA fails in a really fundamental equal protection
21 element, which is pleading that it was treated differently
22 than a similarly situated entity.

23 For this claim to survive and go forward, the
24 NRA must identify a similarly situated entity that was
25 treated differently for an improper purpose. It has not

- J L M -

PROCEEDINGS

1 done that. As I noted before, the purported charities
2 cited by the NRA are not similar for reasons, most notably
3 all involve settlements which the charities agreed to
4 overhaul their leadership. A number of those viewed the
5 scope of wrongdoing or an entities' decision to leave the
6 corporate leadership team in place.

7 I will note that the NRA makes a point in its
8 amended complaint that it has ousted former CFO treasurer
9 Wilson Phillips. That is, in fact, belied by what was
10 determined in the bankruptcy and, again, raised on
11 documents and even some admissions in its answer. Mr.
12 Phillips was allowed to retire under his own steam. He
13 had a lucrative consulting contract that was not board
14 approved. He was not ousted as part of the reform effort;
15 he left. And that is not evidence of cleaning house. In
16 fact, Wayne LaPierre, who is at the center of many of the
17 Attorneys Generals, remains in place and runs the show at
18 the NRA still. In fact, anyone who has challenged him has
19 been ousted. Former president Lieutenant Colonel Oliver
20 North, when he asked for certain reforms was driven out,
21 retaliated against and sued. Board members who have
22 challenged Mr. LaPierre's reign have been retaliated
23 against, denied committee assignments and also driven out.

24 So, this is really a unique instance where an
25 entity, under scrutiny by its regulator, continues illegal

- J L M -

PROCEEDINGS

1 conduct. That is not, the NRA has not cited any similar
2 instances in its counterclaims. On that ground alone its
3 equal protection selective enforcement claims fail. Nor,
4 Your Honor, what I say, the NRA's attempt to characterize
5 the Attorney General's allegations against it as involving
6 isolated wrongdoing of executive misconduct, that's
7 plainly what's not alleged here. What's alleged here is
8 misconduct by the leadership team, including the highest
9 officer within the NRA and its general counsel and
10 secretary to the board, as well as other high ranking
11 officers and employees within the NRA. And a board that
12 either participated in or turned a blind eye to this
13 illegality and this illegal conduct and violation of
14 relevant standards.

15 The NRA, again, has not pointed to any similarly
16 situated entity that has been treated differently on an
17 impermissible basis. On this ground alone, the NRA's
18 equal protection claim fails.

19 I noted before that the NRA has pointed to
20 campaign statements made by the Attorney General as
21 supplying evidence or justifying an equal protection
22 claim. But allegations of political disagreements or even
23 bias alone cannot permit a selective enforcement claim to
24 go forward. And especially they cannot help an entity
25 that is under regulation or facing prosecution to avoid

- J L M -

PROCEEDINGS

1 that action for wrongdoing wholly unrelated to its
2 protected activity. For that I would point the Court to
3 the Exxon Mobil Corp. decision, 360 F.Supp.3d at 704, in
4 which the Court dismissed a First Amendment retaliation
5 action and recognized both that a government official may
6 oppose First Amendment protected activity and belief that
7 illegal conduct has occurred and taken action on the same.

8 I would also point to the Trump Foundation case,
9 62 Misc.3d at 509. Allegations of political disagreement
10 cannot insulate the subject of an ongoing investigation
11 from law enforcement activity. There the Court notes that
12 the Court should not insert themselves into decisions
13 relating to a prosecution or to try to subjectively
14 determine the motivation of a government agency in
15 prosecuting an action. There the Court denied a motion by
16 defendants which alleged that the Attorney General's
17 office was biased.

18 I would finally also cite to In Rem FDIC, in
19 which the 5th Circuit held that taking political
20 considerations into account, even if it occurred, does not
21 establish bad faith or improper behavior by agency
22 official and granted mandamus to quash notices to depose
23 government regulators.

24 So, finally, Your Honor, even if the NRA had
25 properly alleged that it was treated dissimilarly from

- J L M -

PROCEEDINGS

1 similarly situated entities based on impermissible
2 motives, it still would have to show that the treatment it
3 has received is not justified. In this regard the
4 attorney -- I mean, the NRA bears a heavy burden. The
5 courts look to see whether there is a rational basis for
6 prosecutorial choices.

7 I will note that the NRA makes an argument that
8 strict scrutiny should apply to the Attorney General's
9 actions. We disagree with this. The fact is, the case
10 they cite in People versus Aviles, the Court subjected the
11 prosecutor's actions only to rational basis review.
12 There, Your Honor, it was also there was alleged a
13 constitutional violation in regard to the prosecution.
14 The NRA cites no relevant authority. But the law is
15 clear, we believe, that rational basis review would apply.
16 We would cite to People versus Blount, 90 NY2d 998. There
17 the Court of Appeals held that a respondent alleging
18 selective prosecution had to meet a high burden, and
19 failed to sustained their burden because it -- the
20 plaintiff hadn't shown that there was no rational basis
21 for the prosecutorial choices.

22 Here, there is clearly a rational basis. The
23 NRA's continued misconduct is very, very, much public
24 corruption. If it's allowed to continue sends a message
25 to the public, to the members, to others who would donate

- J L M -

PROCEEDINGS

1 money to a charitable entity, that illegal fraud are
2 permitted and can be permitted even as they continue,
3 despite an enforcement action.

4 Your Honor, because the NRA has utterly failed
5 to plead any necessary element of the selective
6 prosecution claim, that claim too must be dismissed.

7 In regard to the NRA's applied constitutional
8 challenge to the State's dissolution statutes, that's
9 Not-For-Profit Corporation Law 1101 and 1102, that claim
10 fails. The NRA has not even tried to demonstrate that the
11 selective prosecution statutes do not pass the test set
12 out in O'Brien. There is no dispute that the New York
13 legislature has the power to regulate charities and has
14 given that power to the Attorney General. There is no
15 dispute that regulating charities furthers an important
16 government interest that the statutes themselves
17 constitute neutral. The interest has nothing to do with
18 such expressing, free expression and everything to do with
19 protecting the public from fraud and waste. And the
20 statutory scheme, even as it relates to dissolution,
21 provides many safeguards, including a requirement that the
22 Court find that dissolution is in the interests of the
23 public or the members.

24 The fact is that these statutes easily pass any
25 constitutional analysis, and the NRA has not tried to show

- J L M -

PROCEEDINGS

1 that they don't. The NRA did again argue that a
2 challenge, constitutional challenge cannot be resolved on
3 a motion to dismiss. That, again, is flatly untrue. Such
4 challenges are dismissed on the pleadings frequently. We
5 have cited in our brief one of these is Liu versus New
6 York.

7 THE COURT: Just to test the boundaries of the
8 argument you're making. I know that this is a
9 hypothetical, not what we have. But if the complaint
10 said, you should dissolve the NRA because their advocacy
11 is bad policy, would you still say that seeking
12 dissolution on those grounds would survive constitutional
13 scrutiny?

14 MS. CONNELL: No, I wouldn't. I would not say
15 that, Your Honor. If the Attorney General's argument was
16 we disagree with the First Amendment message that the NRA
17 engages in, we disagree with the Second Amendment, for
18 example, and we should dissolve it on that ground. It
19 would certainly be subject to a whole different type of
20 analysis than it is here. I think that the key is fraud
21 and illegal conduct are not entitled to First Amendment
22 protection.

23 So to the extent what's being attacked or
24 addressed by the Attorney General's action is illegal
25 conduct, that is not violative of the First Amendment.

- J L M -

PROCEEDINGS

1 But your hypothetical, which is not the case here, and you
2 Your Honor noted that the December 10th argument we have
3 been very clear, that the First Amendment protected
4 activities of the NRA are not the subject of this action
5 at all. It is the fraud, it is the theft, it is the
6 waste, it is related party transactions, it is everything
7 else.

8 So, Your Honor, the challenge to the dissolution
9 statutes fails on that ground and those can be, those can
10 be dismissed on a motion to dismiss.

11 The NRA asserts an associational claim on behalf
12 of itself and its members. We have argued in our papers
13 and belief the NRA does not have standing to assert the
14 associational rights of its members. But even if it did,
15 it has failed to make out a claim of the violation of
16 those rights. This is dealt with easily enough because in
17 its counterclaims at page 140, the NRA specifically
18 discusses its continuing robust advocacy and association
19 activities. So it hasn't alleged any injury thereto. So,
20 Your Honor, we would say that those claims fail.

21 Finally, Your Honor, the NRA's claims against
22 the Attorney General in her individual capacity are
23 clearly subject to dismissal. In regard to her decisions
24 relating to commencement and prosecution of this action,
25 the Attorney General is entitled to absolute immunity.

- J L M -

PROCEEDINGS

1 The NRA has not engaged in any real analysis of that.
2 It's applicable here it bars monetary claims against the
3 Attorney General in her individual capacity. To be clear,
4 claims for injunctive relief would have to be against the
5 Attorney General in her official capacity. Claims for
6 monetary relief would have to be against her in her
7 individual capacity. So, she's entitled to absolute
8 prosecutorial immunity for claims relating to the filing
9 and prosecution of this action. She's also entitled to
10 qualified immunity under both State and Federal law. The
11 State law qualified immunity protects her decisions when
12 she's exercising her discretion. It prevents monetary
13 damages there. In the Federal qualified immunity protects
14 her from facing monetary damages where a reasonable
15 officer in her position wouldn't understand and would not
16 see that they are violating any clearly established right
17 of the defendant.

18 That's the case here. The Attorney General is
19 authorized to regulate charities. She's authorized to
20 prosecute civilly violations of Not-For-Profit Corporation
21 Law. She's authorized to exercise her discretion and
22 assert claims for dissolution where she deems
23 inappropriate. There is no law that clearly establishes
24 that that is illegal. So she's entitled to qualified
25 immunity.

- J L M -

PROCEEDINGS

1 As such, Your Honor, the claims against the
2 Attorney General in her individual capacity must be
3 dismissed across the board.

4 In conclusion, Your Honor, and, again, if you
5 have further questions I'm happy to answer them. I would
6 just say, and to set where we are, that the NRA is taking
7 steps and asking this Court to step in and prevent the
8 Attorney General from prosecuting it, from pursuing its
9 enforcement action and pursuing its dissolution claim, her
10 dissolution claim. The NRA is asking the Court to allow
11 it to pursue claims against its regulator and to seek
12 discovery from that regulator. It's doing this without
13 having pled fundamental facts that it must in order to be
14 entitled to this extraordinary relief.

15 Given the extensive allegations of pervasive and
16 continuing illegality, these claims simply should not
17 survive. As Justice Engoron, your colleague here,
18 recently found when he denied the motion to quash
19 subpoenas or stay an Attorney General action in the Trump
20 organization matter, the Attorney General James has First
21 Amendment rights. She's allowed to speak as a politician
22 on matters in which she's concerned, and where there are
23 allegations and objective evidence that there is illegal
24 conduct going on, claims of bias or selective enforcement
25 simply should not be permitted to stop her prosecution.

- J L M -

PROCEEDINGS

1 With that, Your Honor, barring any other
2 questions.

3 THE COURT: Thank you very much.

4 Ms. Eisenberg.

5 MS. EISENBERG: When Attorney General James
6 commenced her investigation in April of 2019, that did not
7 come out of the blue, that was not a surprise. She had
8 told the entire world nine months previously before she
9 even won her parties' nomination for that Attorney General
10 spot, that she was going to go after the NRA and that she
11 was going to investigate it.

12 When Attorney General James filed this
13 dissolution action against the NRA in August of 2020,
14 again, that did not come as a surprise. That's because as
15 early as August and September of 2018 she had told the
16 world that she was going to take down the NRA. Those are
17 her very words. What's so important about those 2018
18 statements that she made while she was campaigning for
19 Attorney General, is that she did not hide her animus.
20 She said that they are responsible for loss of life. They
21 are why we have the gun violence problem in this country.
22 I disagree with their speech, I know you do too and
23 together we go after them and take them down.

24 That's what is so unusual about this case. None
25 of the cases that Ms. Connell cites involve this fact

- J L M -

PROCEEDINGS

1 pattern. Here we have unequivocally repeated unabashed
2 statements. I'm going after the NRA and thank goodness I
3 have the support of the NPCL. So, let's see whether or
4 not, again, her words, let's see whether the NRA has
5 complied with the NPCL.

6 So, the outcome, as you can tell, Your Honor,
7 was predetermined before the investigation began; before
8 the Attorney General won the election; before she saw a
9 single piece of evidence. She promised her supporters,
10 her voters, her fundraisers, her donors, that together we
11 can take down the NRA. Again, that's what makes this case
12 so unique.

13 Today what Ms. Connell is asking the Court to do
14 is basically saying, well, subjective intent doesn't
15 matter. Notice that Ms. Connell didn't talk about those
16 statements until well into her argument. Subjective
17 intent doesn't matter. And even if Letitia James, in
18 fact, went after the NRA because she disagrees with its
19 political speech and even if when put under oath she would
20 admit that that is exactly why she investigated, sued and
21 sought dissolution of the NRA, that doesn't matter because
22 we have Nieves, and I'll talk about Nieves in a second.

23 Well, the law in this country is not that. If
24 Letitia James went after the NRA because she disagrees
25 with its political speech and that was the substantial

- J L M -

PROCEEDINGS

1 motivator for what she did, that is a First Amendment
2 violation. We have a constitution, we have First
3 Amendment freedoms, we have freedom of speech and we have
4 a judiciary and we can bring these cases to you, Your
5 Honor, to seek a remedy. And there are remedies that
6 exist under the statutes.

7 That's exactly what the NRA is trying to do
8 here, is seek a remedy against a government official who
9 retaliated against the NRA's and its members' political
10 speech.

11 THE COURT: Let me just probe you a bit there as
12 to how far that goes. So if, hypothetically, let's say
13 it's clear that, let's just call it target A has violated
14 the Not-For-Profit Corporation Law in 16 different ways
15 and various other statutes and various other ways, that
16 the fact that the law enforcement officer made speeches in
17 advance saying, I'm going to bring this action, so despite
18 the fact that those actions have merit in, again, in my
19 hypothetical, you're saying that I should throw it out
20 because the decision to go after these meritorious claims
21 was made in advance? It seems like an awfully big
22 loophole to violating the law.

23 MS. EISENBERG: Your Honor, it's not an all or
24 nothing. The claims that Letitia James asserted against
25 the NRA have their own elements and defenses and will be

- J L M -

PROCEEDINGS

1 tried based on the evidence that's presented and our
2 counterclaims.

3 THE COURT: They won't be tried if you win this
4 motion, right?

5 MS. EISENBERG: I hope I do.

6 So, the idea that it's sort of all or nothing I
7 think is false. The NRA --

8 THE COURT: But that's really my question,
9 though. Your position is all or nothing. Your position
10 is that if they had this -- if she had this prejudged or
11 made statements or had it already figured out, it doesn't
12 matter whether the claims have merit, they should still be
13 dismissed. I think that your claim seeks all or nothing.

14 MS. EISENBERG: No, Your Honor. One of the
15 remedies that we seek is dismissal. We never said that we
16 want necessarily the entire complaint dismissed. If you
17 were to dismiss two of the 16 claims, that is a remedy,
18 that's a menu of remedy that's available. But I think
19 that it will really hinge on discovery. Because if we go
20 back to the standard, what constitutes retaliation. What
21 must the NRA prove. The NRA must prove that it engaged in
22 protected speech, which is conceded. And the NRA must
23 prove that what animated or was the substantial motivator
24 for what Letitia James did when she commenced the
25 investigation, when she sued the NRA, when she elected to

- J L M -

PROCEEDINGS

1 sue the NRA for dissolution, whether that was a
2 substantial motivator.

3 So, it may be that Your Honor finds that some of
4 those things were and other things were not. It may also
5 be that you may order that NRA be paid damages as it's
6 entitled to if its constitutional rights were violated. I
7 think that Your Honor can fashion the remedy that's
8 appropriate once the evidence has been offered in evidence
9 at trial. But we are here today on a motion to dismiss.
10 As Your Honor well knows, the Court will accept all facts
11 pleaded as true. Give plaintiff here, the
12 counterclaimant, every benefit of a favorable inference.
13 The only question is whether the facts as pleaded fit into
14 any cognizable legal theory.

15 We respectfully submit that we met that standard
16 abundantly with regard to every one of our counterclaims.
17 This, of course, necessitates a claim by claim review.
18 Because each claim has a different set of elements. So
19 perhaps I can talk a little bit about Nieves.

20 Ms. Connell takes this case out of context and
21 offers it to the Court as establishing a general First
22 Amendment jurisprudence point. I disagree for the reasons
23 I will discuss in a second. But I will also note that
24 Nieves itself recognized that there will be exceptions to
25 the pleading requirements set forth in Nieves. I will

- J L M -

PROCEEDINGS

1 also note that even if Your Honor were inclined to think
2 that Nieves is applicable and no exception applies, the
3 NRA has absolutely pleaded that the NYAG, the Attorney
4 General, would not have sought dissolution "but for" her
5 animus.

6 We say in paragraph 23, "Viewed in the worst
7 possible light, her allegations do not justify her
8 decision to pursue dissolution." We say in paragraph 32,
9 "It was never about internal controls or governance,
10 rather always about political prosecution of the NRA
11 because of her repeatedly expressed bias." These are just
12 some examples. So, just for the fact that the words "but
13 for" weren't mentioned, that doesn't mean that we haven't
14 met the pleading standard; we certainly have.

15 Let me go back to why I think that Nieves is
16 being mischaracterized, Your Honor. Nieves, as you know,
17 is a retaliatory arrest case. And the Court grappled with
18 the problem that when a police officer arrests someone
19 it's very common for that person to say something. The
20 Court was also very concerned about safety of the
21 community and safety of the police officer. And the Court
22 said, well, sometimes what a person says cannot even be
23 sort of bifurcated in the police officer's mind because it
24 may be an offensive statement that can be used as a First
25 Amendment violation predicate, but it also may be an

- J L M -

PROCEEDINGS

1 indication of danger to the community. So the Court was
2 grappling with a very different type of situation that's
3 very much unlike here.

4 You did not have Attorney General James having
5 to make a split second decision whether or not she should
6 investigate, sue or dissolve or try to dissolve the NRA.
7 You did not have community safety or police officer safety
8 concerns at issue. So in that context Nieves puts forward
9 this rule, and the Court was really concerned about tons
10 of litigation going to trial and surviving a motion to
11 dismiss. And the Court said in that context, in order to
12 overcome the motion to dismiss the person who was arrested
13 must plead that there was no probable cause for the
14 arrest. Then if they make it to trial they have to show
15 the same at trial.

16 So, Ms. Connell takes that and she says, aha,
17 there is this "but for" requirement. We're just going to
18 apply it through to the entirety of First Amendment
19 jurisprudence, including to this white collar case where
20 the exigencies at issue in Nieves do not come into play.
21 Nieves talks about the causal complexity of the situation
22 and, again, is concerned about whether courts and juries
23 will be simply overwhelmed. Luckily we don't have many
24 cases where Attorneys General do what was done here. So
25 that concern certainly should not be an issue.

- J L M -

PROCEEDINGS

1 In Nieves there is an exception, Your Honor.
2 They say, well, even if the plaintiff does not plead that
3 there was no probable cause, they can be excused from that
4 requirement if it's a type of thing that everybody does
5 every day but they don't get charged. Here if you jay
6 walked and the police officer went ahead and charged you,
7 then it doesn't matter because obviously animus is what's
8 at issue.

9 Now, there is also on the case called Lozman,
10 which was a case where the -- actually let me one second.

11 THE COURT: I assume that you're not analogizing
12 the allegations here to jay walking.

13 MS. EISENBERG: Yes, Your Honor. No, of course
14 not. I'm so -- I blanked out on the facts of Lozman.
15 What happened in Lozman was, you had an individual who was
16 outspoken against the local government. He alleged that
17 there was a policy put in place by the local government to
18 go after him. Then he attended, this is what was supposed
19 to be an open meeting, and attempted to speak about his
20 concerns at the meeting and was shortly thereafter
21 arrested. So, Lozman was before the Supreme Court before
22 Nieves. In Lozman, the Supreme Court was being asked to
23 set forth the rule that the Nieves court later did.
24 Specifically, the police officer who arrested this
25 gentleman testified that there was probable cause. And

- J L M -

PROCEEDINGS

1 the Court was being asked to say that despite allegations
2 of things that had occurred previously, and the alleged
3 policy being put in place to go after this gentleman, the
4 arrest and the probable cause, if you will, cleansed it.

5 If you listen to the oral argument and read the
6 opinion in Lozman, the Court declines that invitation.
7 They say, look, this is not your typical retaliatory
8 arrest case. This is a very different situation, even
9 though it was an arrest case. So, when finally the Court
10 reached the issue in Nieves on those facts, I think given
11 what the Court did in Lozman and also given that they
12 allowed for an exception, and if you read the Nieves
13 opinion it actually doesn't refer to jay walking on its
14 face, they talk about jay walking during the oral
15 argument. But the opinion on its face basically says, if
16 it's the kind of thing that people usually don't get
17 charged with but here you were, then you are excused from
18 pleading lack of probable cause.

19 Now, obviously this is kind of making a slightly
20 different argument. But one of the things that we're
21 saying here is, that there are a lot of companies who have
22 been, again, whom the Attorney General brought enforcement
23 actions. But even though they were similarly situated,
24 she did not seek dissolution. So there is definitely an
25 analogy there. But I come back to my main point. We do

- J L M -

PROCEEDINGS

1 plead that it was the "but for" cause.

2 So, you really have three ways in sort of
3 overcoming this Nieves based objection that Ms. Connell
4 raised. First, that Nieves, given its context, doesn't
5 apply. Second, that there ought to be an exception that
6 the plaintiff is saying that I was charged with something,
7 I was charged with -- I was basically -- I committed a dis
8 con and the prosecutor wants a death penalty. This
9 literally may be like a class A felony, I don't know, but
10 that's basically the analogy. The third basis upon which
11 the Nieves objection can be overcome is, by looking at our
12 counterclaims and seeing that that is exactly what we
13 allege. That Letitia James, Attorney General James would
14 not have done what she did "but for" her animus.

15 THE COURT: Let me ask, one of the concerns I
16 have that I'm sure you're going to get to but Ms. Connell
17 I think put very well, there is this separation of powers
18 overarching issues here where my role here is to preside
19 over these claims as they are brought and if they don't
20 have merit to get rid of them, or the jury would get rid
21 of them, or I can't get rid of them on motion but on the
22 merits, and that's one thing and that's my job.

23 The Attorney General's job is to decide what
24 cases to bring and to try to persuade a jury or a Court
25 the merit of those claims. That lane, that's the law

- J L M -

PROCEEDINGS

1 enforcement lane. But the kind of claims that you're
2 bringing here really do ask me to cross over and meddle
3 with and look into the mind of law enforcement. You know,
4 in the absence of something like we talked about before
5 where she says, I'm seeking to dissolve them because I
6 don't like their politics, which is not, which is not what
7 this claim is about. Putting aside motivation, there is
8 nothing in this claim that talks about the content of the
9 NRA's messaging or advocacy. But I don't know where it
10 ends. Because you're basically saying that I can from my
11 seat start looking into what the Attorney General had in
12 her mind, basically undo her prosecutorial decisions. The
13 bar to doing that is extremely high. And I find it's
14 absent really extreme facts. I think that it's a high
15 hurdle for you to get over.

16 In terms of the preelection rhetoric, I mean, I
17 think that you'll see politicians in every debate when
18 they are running for office making all sorts of statements
19 about what they intend to do. That's kind of what voters
20 want to know. I'm not suggesting that I'm adopting any of
21 the comments that any particular politician makes or not,
22 but I'm concerned about this separation of powers problem
23 here.

24 So, I would like you to help me figure out where
25 the boundaries are to your argument. Because it seems

- J L M -

PROCEEDINGS

1 like what you're saying, if I agree with you, merits don't
2 matter, I throw out the case or at least some of the
3 claims, simply because I disagree or because there is some
4 argument that in the prosecutor's mind some improper
5 motivations were involved.

6 MS. EISENBERG: Certainly, Your Honor. We are
7 at a motion to dismiss stage. Today you're not being
8 asked to dismiss any claim on the ground that bringing it
9 violated the First Amendment. Today you're simply being
10 asked whether the NRA pleaded a cognizable legal theory.
11 All we're trying to accomplish is to finally get
12 discovery.

13 THE COURT: But that's the problem, right? What
14 I'm being asked to do is open up a vein, a new litigation
15 within the litigation, where the Attorney General pursues
16 the defendants and now the defendants pursue the Attorney
17 General for bringing the case. A, that is a big step and,
18 B, it is a legal finding. What you're asking me to make
19 is a legal finding that if you prove everything that's in
20 your counterclaims, then you have a viable claim. So it's
21 not a meaningless gesture for me to deny a motion to
22 dismiss. I basically would be saying that if you prove
23 all of that, the claims will be dismissed.

24 MS. EISENBERG: Well, we have to see what
25 discovery shows. Because we don't know what discovery

- J L M -

PROCEEDINGS

1 will show. We think that the facts that we allege are
2 already very concerning. We've tried to get discovery
3 from Everytown because Attorney General's representatives,
4 including the head of the Charities Bureau met with
5 Everytown two months before the investigation began, and
6 we haven't been able to get anything from Everytown, they
7 are resisting it.

8 So, I think that all we're trying to do is get
9 discovery. But I understand your point that if today you
10 sustain our claims, you're effectively, to some extent,
11 agreeing with us. And I think that you should. I don't
12 think that separation of powers in this instance presents
13 a problem, and here is why. They, the Hartman case on
14 which Ms. Connell relies to talk about presumption of
15 regularity or good faith of the prosecutorial decision, is
16 completely inapposite. What happened in that case was,
17 you had postal inspectors who had a vendetta against a
18 defendant who they wanted charged. And then they got
19 charged. And in passing the Court says, that when the
20 prosecutor charged this defendant with participating in a
21 kickback scheme, her decision was both based on probable
22 cause and enjoys this presumption of regularity.

23 Now, the problem is, that if you charge someone
24 criminally in the Federal system you either have an agent
25 swear out an affidavit before a magistrate judge who

- J L M -

PROCEEDINGS

1 agrees that there is probable cause, or you go in front of
2 24 members of the grand jury and they have to agree that
3 there is probable cause. That is not what happened here.

4 Attorney General James promised that she would
5 go after the NRA and try to dissolve it. She went ahead
6 and her office investigated the alleged misconduct, and
7 then she is the one who went ahead and filed the
8 complaint. So, for them to rely a Hartman and say that
9 here her decision enjoys any kind of presumption is simply
10 not merited. In addition, the other problem is that --
11 well, let me move on.

12 So, as you know, Your Honor, the other claims
13 that we brought are that you have selective enforcement.
14 Again, you go back to the basics. You say what are the
15 elements of the claim and they are, that you have
16 similarly situated people who were treated differently.
17 And the law is clear that you don't need a complete mirror
18 image. A rough comparator equivalent is enough as long as
19 a juror finds it to be enough. So the facts that we are
20 here arguing about, whether those cases are similar or
21 not, I think is yet another reason to allow us to move to
22 discovery. Certainly nothing that the Attorney General
23 put forth in her motion to dismiss rendered, annihilates
24 any of our allegations about those other cases. So that's
25 definitely something that is pleaded appropriately.

- J L M -

PROCEEDINGS

1 THE COURT: So, if I permit this claim to go
2 forward, does that mean that you get discovery not only of
3 all of the motivations that went into this case, but also
4 the motivations that went into all those other cases?

5 MS. EISENBERG: Yes, Your Honor, that would be
6 appropriate. Although I'm sure that the Attorney
7 General's office will assert a variety of privileges and
8 we'll have to work through that, and whatever is
9 discoverable will then be used. But the elements of
10 selective enforcement are where similarly situated people
11 are treated differently. So the issues are they had
12 similarly situated and were they treated differently. And
13 if so, then the next question is, was that because of an
14 impermissible basis.

15 Therefore, we go back to the Attorney General or
16 Candidate James' 2018 statement where she was very clear
17 about her animus and disagreement with the NRA's political
18 speech.

19 THE COURT: Before we leave that. So, the trial
20 that you would envision, if you prevail on this motion and
21 you get past summary judgment and everything else, whether
22 it's the jury or a Court, I don't know exactly how this
23 kind of a claim would go, there would be sort of seven
24 trials within a trial or eight or nine or ten where we
25 sort of look at what the Attorney General did in Smith

- J L M -

PROCEEDINGS

1 versus Jones and, you know, and we have to have fact
2 findings about all these other cases to see if they are
3 comparable?

4 MS. EISENBERG: Your Honor, the bottom line is,
5 as a plaintiff you have to show that there are similarly
6 situated people who are treated differently. Of course
7 there are issues of sort of courtroom time management, and
8 I'm sure that Your Honor will expect us to present our
9 evidence succinctly, and we'll do our best to do that.
10 But, yes, that is what the standard requires.

11 THE COURT: Okay.

12 MS. EISENBERG: And the values that we're
13 talking about today are constitutional, fundamental
14 protections, freedom of speech, freedom of association,
15 equal protection, due process. The same set of
16 protections under the New York Constitution.

17 So, to go back to your question about separation
18 of powers. I think that I can understand why a Court
19 might be reluctant in any kind of case to say, well, is it
20 a step too far. But I think that in this case it's not
21 because of the very openly -- because of the statements
22 that were made in 2018. And that basically said, I'm
23 going to use the NPCL to go after the NRA because I think
24 that they are the reason that we have the gun violence
25 problem.

- J L M -

PROCEEDINGS

1 In addition, because here you had the same
2 person being the investigator and the prosecutor, because
3 there was no magistrate judge saying that there was
4 probable cause, there was no grand jury saying that there
5 was probable cause. In her bankruptcy filings Attorney
6 General James said to Judge Hale, the dissolution claim
7 that I seek is a very high bar. I have to show that there
8 was harm or menace to the public. I have not heard Ms.
9 Connell say that today.

10 In other words, in those pleadings which you
11 have before you, they were submitted in connection with
12 our motion to dismiss. They admit that the dissolution
13 statute is reserved for a very rare case. Then the fact
14 that they're pursuing dissolution on facts that don't meet
15 the standard that they themselves articulated is yet
16 another reason why there is ample basis for the Court to
17 deny their motion to dismiss and allow discovery. Of
18 course, even though I understand with what Your Honor said
19 about sort of agreeing with us to an extent, that
20 certainly does not prejudice the merits.

21 I also want to say that in a case called 303
22 West 42nd Street versus Klein, the Court of Appeals of
23 New York specifically said, "That the theory is that
24 conscious discrimination by public authority taints the
25 integrity of the legal process to the degree that no Court

- J L M -

PROCEEDINGS

1 should lend itself to adjudicate the merits of the
2 enforcement action. This even though the party raising
3 the unequal protection claim may well have been guilty of
4 violating the law."

5 There are a series of comments that relate to
6 various things that Ms. Connell made and I made a list and
7 I just wanted to address them. First, with regard to the
8 Judge Engoron's decision, it's completely inapposite.
9 What you have there is, you had Michael Cohen, Donald
10 Trump's lawyer, come forward with evidence way before
11 Letitia James made any statements about wanting to go
12 after Donald Trump. What you had there was her saying she
13 was going to go after that. So, you have the evil eye of
14 the jurisprudence framework, but the defendants or the
15 people who were being subpoenaed for depositions, the
16 targets, they did not allege that there was the unequal
17 hand. Here we do and we give a lot of examples.

18 The submission by the Attorney General about
19 this case, I think the case is inapposite. And to the
20 extent that submissions, quotes from the December 10
21 transcript, we think that's inappropriate because there is
22 no reason why that could not have been included in their
23 moving brief or the reply brief. But in any case, I would
24 like to talk about the timeline.

25 So, in the Attorney General's brief she moves to

- J L M -

PROCEEDINGS

1 dismiss and she says, when I commenced the investigation
2 all these things were happening. There was the New Yorker
3 article and the whistleblowers and Oliver North, who we
4 really think is a whistle maker and not a whistleblower,
5 and certain board members departed. And she doesn't
6 really give a specific date. She doesn't lay things out
7 clearly, but I wanted to do that. I want to point out
8 that none of those things happened before Letitia James
9 said that she wants to investigate the NRA. That is yet
10 another reason why the Court should not hesitate in this
11 case to grant us discovery. That would be preeminently
12 unfair because these inquiries about impermissible
13 motives, causation, and courts have said this they are so
14 factually intensive. And even at summary judgment
15 sometimes it's not appropriate to resolve them then. But
16 we're not even at summary judgment, we are simply at a
17 motion to dismiss stage.

18 THE COURT: I'm hoping that we can take a break
19 in a moment and then get back to Ms. Connell for a brief
20 reply, and then finish up. Do you have a lot more time?

21 MS. EISENBERG: No, Your Honor, I'm just
22 checking my notes to make sure I didn't miss anything
23 important.

24 So, in terms of the selective enforcement claim
25 and the comparators, so you basically have three sets of

- J L M -

PROCEEDINGS

1 comparators that were offered to you, right? So first we
2 gave you a bunch of cases where it was a sham entity and
3 we say we're not like it. And what Ms. Connell does, she
4 says, well, there is no requirement that it be a sham,
5 that's not what we're saying. We're just saying that
6 typically that's what happened, and our case is not like
7 that.

8 Then there is a second set of comparators which
9 we think are like our case. Where the government did not
10 seek dissolution and the government does not -- the
11 Attorney General does not really deal with any of those
12 cases in their brief. But even the excuses that they give
13 to say why it was different don't make sense.

14 For example, the Attorney General says that
15 there was a conviction. Now, if there was criminal
16 behavior warranting a conviction, one might think that
17 that would be an even better reason for seeking
18 dissolution or if you were to compare the two.

19 In addition, you have cases where the government
20 or the Attorney General sought reform and monitorships and
21 all of those things. In other words, there was real
22 emphasis on recognizing the legacy of a corporation and
23 the social purpose that it serves and helping it survive
24 given that. That's not something that an Attorney General
25 decided to do here.

- J L M -

PROCEEDINGS

1 THE COURT: Those are settlements, right? In
2 other words, you could have a settlement in this case
3 doing the same thing. That doesn't -- I don't recall
4 whether in all of those cases was there -- are you saying
5 that there was no claim in any complaint seeking
6 dissolution or that the settlement happened before there
7 was a complaint?

8 MS. EISENBERG: I don't know that all of them
9 were settlements before a claim was brought, but I can't
10 represent it one way or another.

11 THE COURT: But this, I think that settlements
12 are distinguishable because, you know, we don't have that
13 here, we don't have a settlement.

14 MS. EISENBERG: Yes. Now that I'm kind of
15 thinking back, there were some claims brought against
16 individuals to recover moneys that went out or to bar them
17 from serving on a board yet, dissolution was not sought.
18 And importantly, there is also at least one case where the
19 allegation was that the board of trustees was asleep at
20 the switch and wasn't paying attention. But I think that
21 we're back to the issue that a reasonable jury might
22 decide that in a similar type of situation we were not
23 treated the same.

24 The last set of comparators that we have is the
25 Multicultural case, the Trump case and the Northern

- J L M -

PROCEEDINGS

1 Leasing case which Ms. Connell puts forward. She says,
2 well, these cases show that we actually seek dissolution
3 from time to time. Those cases show that they're just
4 like the NRA and that's why there is no dissimilar
5 treatment here. So, I would like to go briefly through
6 each and make clear how those cases are way worse and
7 nothing like our case.

8 First, in the Federation of Multicultural
9 Programs case you had a facility or set of facilities who
10 were comparing for disabled individuals that provided them
11 with residence and health services. What happened was as
12 early as 2011 the New York Times was reporting on
13 embezzlement, self-dealing and the like. And then in 2015
14 when the Attorney General finally sought dissolution, what
15 they were talking about is medication errors, insolvency,
16 shortages of food, failure to investigate physical abuse
17 at the facility.

18 So, that's where you have a situation where a
19 corporation is conducting its business in a private
20 illegal way. Here you don't have those types of
21 allegations. There is also what strikes me as an
22 inaccuracy, I'm sure not intentional. In the Attorney
23 General's brief she says, look at the Multicultural case,
24 that is an example where we obtained dissolution based on
25 embezzlement or breaches of fiduciary duty or self-dealing

- J L M -

PROCEEDINGS

1 and the like.

2 Now, they did not move for dissolution in that
3 case on the basis of 1102 (b) statute, which is the basis
4 here. Which is that officers and directors and
5 controllers of the corporation looted and wasted its
6 assets and perpetrated the corporation solely for their
7 benefit; that was the basis. The basis in Multicultural
8 Programs was that the company was insolvent and that the
9 order that Ms. Connell submitted to you as an exhibit
10 specifically says 1102 (a) 2 (a), which is insolvency. So
11 that's completely inapposite and certainly does not move
12 the needle in terms of us having shown just how unusual
13 this case is.

14 In the Trump case the company was winding down.
15 There were allegations that moneys were used for political
16 purposes. You asked Mr. Conley on December 10 to quantify
17 and he couldn't. They certainly cannot make any or draw
18 any kind of analogy to the Trump Foundation situation,
19 where the majority of the funds were not being used for
20 the charitable purposes specified in the charity.

21 Last by not least, you have Northern Leasing
22 Consumer which is not even a charity situation. And Ms.
23 Connell puts it forward as another situation that she says
24 is like here. Well, nothing about Northern Leasing is
25 like here. What you had there was adhesion contracts that

- J L M -

PROCEEDINGS

1 the company obtained through a fraud. And all these
2 consumers or all these customers were stuck with contracts
3 that they didn't want. So, this was a financial consumer
4 fraud case. And the company literally conducted its
5 business in a fraudulent way. So, again, that's not an
6 apposite analogy in any way, shape or form.

7 THE COURT: I think that I have the arguments
8 from your argument here and in the briefs. I would like
9 to take a short break to give, in part, Jack's fingers
10 times to recoil and recover. Then, Ms. Connell, go back
11 to you for short'ish rebuttal. All right, let's take
12 five.

13 MS. CONNELL: Thank you, Your Honor.

14 (Short recess taken)

15 THE COURT: Ms. Connell, I'm going to try to
16 keep your rebuttal to ten minutes.

17 MS. CONNELL: I'm going to try. I was hoping
18 Jack's fingers would need more rest, but I've been trying
19 to narrow this argument. But I'm going to do it.

20 THE COURT: Jack's fingers probably do need more
21 rest but I have to get onto another thing, so.

22 MS. CONNELL: Excuse me, I refer to Mr. Morelli.

23 The NRA's arguments ignore the presumption of
24 regularity. They cite to the Hartman decision and say
25 it's inappropriate here. But the presumption of

- J L M -

PROCEEDINGS

1 regularity and the deference to prosecutorial regulatory
2 discretion is present and cited to in numerous cases
3 throughout the Attorney General's and the NRA's papers.

4 Indeed, even the Klein case cited by the NRA
5 recognizes the extremely heavy burden that someone
6 claiming discriminatory enforcement must bear. And that
7 case is easily distinguishable to the case here. The
8 presumption applies to civil enforcement proceedings and
9 it applies here.

10 The NRA has functionally admitted that it wants
11 to go on a fishing expedition. It is seeking discovery to
12 show somehow that this entire enforcement action should be
13 foreclosed. It cannot and should be not be permitted to
14 go on such a fishing expedition for numerous reasons.
15 Some of them are policy, because the defendants in
16 criminal and civil enforcement and regulatory activities
17 should not be able to subject government attorneys to such
18 inquiries. Apparently we would be forced to defend
19 regulatory decisions in numerous, perhaps innumerable
20 cases if these counterclaims were allowed to proceed. But
21 most importantly and fundamentally, the NRA attempts to
22 leap frog over fundamental pleading requirements. This is
23 not something that the Attorney General has made up. This
24 is the law. If they want to assert these counterclaims
25 they must plead these elements, and they have not done

- J L M -

PROCEEDINGS

1 that.

2 Nieves is a case in which the Supreme Court
3 announced a "but for" causation requirement applicable to
4 First Amendment retaliation cases. The NRA's arguments on
5 the facts and the holding of that case are misplaced.
6 That standard has been recognized in numerous other cases.
7 The fact that the NRA didn't address it in its papers, I
8 think, speaks volumes.

9 The NRA is looking to fish their way out of this
10 litigation. It's not the first time that they tried. One
11 court, the Bankruptcy Court in Texas has already found
12 that it has tried to evade regulation. This is the latest
13 attempt. It's also been to the panel on multi-district
14 litigation. It's been to the Northern District of New
15 York. It raised claims of bias in People versus Ackerman
16 McQueen, the case we cited in our moving papers. And when
17 the Court rejected that claim, decided not to appeal in
18 the end, Your Honor. There are very, very, serious
19 allegations of extensive, long running pervasive
20 illegality and fraud within the NRA that continues until
21 this day. And the NRA has not pled what it needs to plead
22 to be able to assert counterclaims against the Attorney
23 General. For those reasons we ask that these
24 counterclaims be dismissed in their entirety.

25 THE COURT: Thank you very much.

- J L M -

PROCEEDINGS

1 MS. EISENBERG: Your Honor, may be heard for ten
2 seconds?

3 THE COURT: I thought you had wrapped up? That
4 seems like a crescendo to me.

5 MS. CONNELL: I had two other separate issues.

6 THE COURT: It was an interim crescendo.

7 MS. CONNELL: It was matters relating to the
8 special master. Should I go ahead or --

9 THE COURT: Yes, go ahead.

10 MS. CONNELL: Your Honor, the special master had
11 asked that the parties or the NRA notify the Court of a
12 potential objection to the special master by today so that
13 it could be resolved, because we are proceeding with
14 discovery disputes in front of the special master. Also,
15 Everytown for Gun Safety has brought a motion to quash a
16 subpoena issued by the NRA. The Attorney General filed a
17 letter essentially agreeing with that motion but asking
18 that it be referred to the special master and we believe
19 that it should be under the terms of the appointment.
20 Everytown consented or has no objection to the same. The
21 special master is wondering what the status of that is.
22 In the meantime, NRA has brought a cross-motion to compel.
23 So that is also outstanding, whether that will be heard by
24 Your Honor or by the special master.

25 THE COURT: I mean, it seemed to me clearly the

- J L M -

PROCEEDINGS

1 idea was the special master to hear all those discovery
2 issues. I'm sorry, just so I'm -- the shift of focus
3 caught me off guard a little bit. So, are you asking
4 whether the NRA has reached a final conclusion as to
5 whether it has any objection to the special master?

6 MS. CONNELL: I'm just trying to follow the
7 special master's instructions. He asked that these two
8 issues be raised with the Court and I wanted to make sure
9 that we raised them.

10 THE COURT: I hadn't seen that part. Last I saw
11 was that Ms. Eisenberg said that they were thinking about
12 it. Has there been -- have we now come to an impasse? Is
13 there some objection?

14 MS. CONNELL: No, Your Honor.

15 MS. EISENBERG: May I address the Court?

16 THE COURT: Let me let Ms. Eisenberg finish up
17 then.

18 MS. CONNELL: Ms. Eisenberg or myself? Okay.

19 MS. EISENBERG: Thank you, Your Honor. May I be
20 allowed ten seconds to complete my argument on the motion
21 being argued today.

22 THE COURT: I wasn't aware that I cut you off.
23 But if I cut off your ten seconds, go ahead.

24 MS. EISENBERG: Thank you very much. I direct
25 your attention to pages one and two of our opposition

- J L M -

PROCEEDINGS

1 brief. In the footnote there are three bullets that
2 showcase certain of the statements made during the
3 campaign. I just wanted to emphasize how she avows to
4 take down and destroy the NRA. It's a pledge, it's not
5 just your normal run-of-the-mill campaign rhetoric,
6 nothing like that. So I think it's very important.

7 I appreciate you giving me that opportunity now
8 to answer your question, Your Honor. We need time to
9 consult with our client. As you may know, Mr. Frazer and
10 Mr. LaPierre are recused from this case because they are
11 co-defendants. All decisions related to this case are
12 made through the special litigation committee which
13 consists of three board members who are volunteers.

14 We have brought this matter to their attention
15 and we just need time to thoughtfully consider it. We
16 hope that there is not going to be a problem, but we
17 haven't had a chance to reach a decision yet and we will
18 as soon as we can.

19 THE COURT: I honestly don't really understand
20 what the issue is. The only issue is that Judge
21 Sherwood's firm in a separate case is representing
22 counsel, the law firm that is counsel for one of the other
23 defendants. Is that basically it?

24 MS. EISENBERG: No, that's not all, but that's
25 one of the four components, Your Honor. Would you like me

- J L M -

PROCEEDINGS

1 to address the others?

2 THE COURT: Well, if I'm not going to resolve it
3 now. I don't want to just sort of give any advisory
4 opinions.

5 MS. EISENBERG: Your Honor, we understand.

6 THE COURT: I want it resolved because if things
7 are starting to stack up, you know, I guess all I would
8 just urge is, that you're never going to find a perfect
9 person who has never met anyone. You have a lot of law
10 firms in this case, you have a lot of the people. What
11 I've seen, Judge Sherwood has absolutely nothing to do
12 with any of those other cases. He's been at that firm for
13 an extremely short period of time. And the entity is
14 not -- the related or overlapping entity is a law firm,
15 not a party here.

16 So, you may have to explain to me what it is.
17 But if you don't have a position from your client yet,
18 it's probably nothing to talk about.

19 MS. EISENBERG: I want to assure you that we're
20 not trying to be difficult. In fact, as you may recall,
21 the NRA, sort of directed this process toward signing the
22 stipulation and just this past weekend this information
23 came to light. We are trying to bend over backwards to
24 make it work and we just need a little bit more time.

25 I want to assure you that the NRA actually used

- J L M -

PROCEEDINGS

1 Winston & Strawn in a different lawsuit. The NRA is also
2 trying to get records from Winston & Strawn related to
3 this lawsuit and they are completely opposing that. They
4 are counsel for Mr. Cox. Cox, as you know -- so there is
5 a lot of different touch points.

6 THE COURT: I still don't really genuinely, I'm
7 not being, I hope, obtuse here, I'm not understanding what
8 difference any of that makes if you have a dispute with
9 one of the counsel for another defendant. You're not
10 seeking to have them disqualified for some reason from
11 being in this case on behalf of another party. Why would
12 that have anything to do with Judge Sherwood?

13 MS. EISENBERG: Well, his partner in his lawsuit
14 represents the Winston & Strawn, that's what we're trying
15 to mull over.

16 THE COURT: I'm not sure he's a partner anyway,
17 but maybe he is. But I'm not sure what difference that
18 makes. But I'll let you -- you need to bring this to a
19 head because I'd like not to have discovery just languish
20 on both sides.

21 MS. CONNELL: Absolutely.

22 THE COURT: So, it just doesn't seem like it
23 should be that complicated. That's just my two cents.

24 Thank you all very much. I'm going to take
25 this, the motions today, under submission and get you

- J L M -

PROCEEDINGS

1 written order. Thank you very much.

2 MS. CONNELL: Thank you.

3 THE COURT: Please, you probably already, if you
4 don't have Jack's information he can stay on and give you
5 his coordinates. Thanks very much.

6 * * *

7 CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT.

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JACK L. MORELLI, CM, CSR

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- J L M -

PROCEEDINGS

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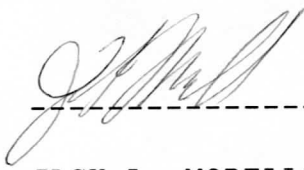
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