BREWER
ATTORNEYS & COUNSELORS

May 24, 2022

VIA NYSCEF

Honorable Joel M. Cohen
Justice of the Supreme Court of the State of New York
Commercial Division, New York County
60 Centre Street
New York, NY 10007

Re: ***People of the State of New York by Letitia James v. National Rifle Association of America et al., Index No. 451625/2020*** **- Motion Sequence No. 13**

Dear Justice Cohen:

Per the order dated May 9, 2022 (NYSCEF No. 658), the National Rifle Association of America (the "NRA") respectfully submits this letter to further oppose the NYAG's motion to dismiss the NRA's counterclaims (the "Counterclaims"), which seek monetary, declaratory, and injunctive relief against the NYAG in her individual and—where applicable—official capacity for violating the NRA's and its members' constitutional rights (the "Motion").

As the NRA demonstrated below, in prior filings, and at the oral argument,[1] the Counterclaims are procedurally sound, far from moot, and sufficiently pleaded to raise questions of fact for trial. At a minimum, the Court has no basis for dismissing the counterclaims at this early pre-discovery stage. As a result, the Court should deny the Motion.[2]

I. BACKGROUND

On March 2, 2022, the Court dismissed four claims asserted by the NYAG in this action, including (i) the claim under N-PCL 1101 for judicial dissolution of the NRA; (ii) the claim under N-PCL 1102 for the same relief; (iii) the claim against the NRA under the NYPMIFA for remedies for alleged mismanagement of institutional funds; and (iv) the claim against individual defendants for common law restitution. To, among other things, answer surviving claims, on March 23, 2022,

[1] NYSCEF 543; NYSCEF 625.

[2] Notwithstanding the Commercial Division's presumption for the continuation of discovery while a motion to dismiss is pending, to date, no discovery has occurred on the NRA's counterclaims. As a result, the allegations in the Counterclaims come predominantly from public sources as well as a Fed. R. Civ. P. 30(b)(6) deposition of a representative of the OAG taken by the NRA in preparation for a hearing that occurred in the course of the NRA's chapter 11 proceeding. Yet, the NRA's Counterclaims already allege a consistent pattern of unquestionably unconstitutional behavior against the NRA by Letitia James and other senior New York state officials.

the NRA filed its Verified Answer to Amended and Supplemental Complaint and Counterclaims (NYSCEF 622).

Twenty days later, on April 12, 2022, the NRA amended the pleading as of right pursuant to CPLR 3025(a). First Amended Verified Answer to Amended and Supplemental Complaint and Counterclaims (NYSCEF 628). The amendment asserted additional allegations, some of which are addressed in the NYAG's letter dated May 17, 2022.

In the letter, the NYAG states that the Counterclaims should be dismissed despite the NRA's amendments. However, as the NRA demonstrated in its prior opposition to the Motion, the counterclaims are properly stated and should survive. The NYAG's supplemental submission—like her prior filings and arguments—fails to carry her burden. The pleading is to be afforded a liberal construction, and the court is to "accept the facts as alleged in the complaint as true, accord [the Counterclaims] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Schmidt-Sarosi v. Offices for Fertility and Reproductive Medicine*, *P.C.*, 150 N.Y.S.3d 75, 77 (1st Dep't 2021). As set forth below, the NRA has sufficiently alleged its Counterclaims and the Motion to Dismiss should be denied in its entirety.

II.
ARGUMENT

A. The Counterclaims *ab initio* and as supplemented are procedurally proper.

Contrary to the NYAG's argument, the NRA's First Amended Verified Answer to Amended and Supplemental Complaint is a proper amendment as of right under CPLR 3025(a), which permits a pleading amendment once within twenty days after its service. Here, the NRA served the pleading (NYSCEF 628) within the statutorily permissible time (NYSCEF 622). The amendments deleted allegations related to the now-dismissed dissolution claims and alleged other instances of NYAG's enforcement treatment of other corporations as further allegations of the NYAG's retaliatory motive and selective enforcement here.

The NRA's *Corrected* First Amended Verified Answer to Amended Supplemental Complaint, NYSCEF 629, filed on April 15, 2022, contains the same substance as NYSCEF 628. The only differences are typographical and paragraph numbers.

Even if leave *were* required under 3025(b), and if the objection on such basis had not been waived,[3] the NRA respectfully requests that the Court permit the amendment. Under

[3] The NYAG waived any objection to the NRA's amendments of its counterclaims. Where a party serves an amended pleading without leave of court under CPLR 3025(b) beyond the time prescribed in CPLR 3025(a), the opposing party waives the objection unless she rejects the

CPLR 3025(b), "a party may amend [a] pleading, or supplement it by setting forth additional . . . transactions or occurrences, at any time by leave of court." Under the rule, "[l]eave shall be freely given." *McCaskey, Davies and Assocs. v. New York City Health & Hosps. Corp.*, 59 N.Y.2d 755, 757 (1983) ("leave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay"). The NYAG claims no surprise or prejudice from the modest amendments.

B. The Counterclaims are not moot.

For three independent reasons, the Court should hold that, contrary to the NYAG's argument, the Counterclaims are not moot.

First, it is true that the dismissal of the dissolution claims rendered moot the Counterclaims *to the extent* they sought (i) such dismissal; or (ii) a judgment declaring N-PCL Article 11 to be unconstitutional as applied to the NRA in this case. But, it is well settled that "[a] proceeding is not moot when the rights of the parties will be directly affected by the determination of the [proceeding] . . . [as] an immediate consequence of the judgment." *N.Y. State Correctional Officers and Police Benev. Ass'n v. N.Y. State Office of Mental Health,* 138 A.D.3d 1205, 1206 (3d Dep't 2016). What the NYAG's fails to acknowledge is that, here, in its Counterclaims, aside from the injunctive and declaratory relief mentioned above, the NRA seeks various types of ***other*** relief.

For example, the Association requests monetary relief, including damages for the NYAG's constitutional violations *and* attorney fees incurred to prosecute its counterclaims. Naturally, dismissal of the dissolution claims does not erase damages suffered by the NRA and their members as a result of the NYAG's violations of their constitutional rights by engaging in official conduct that, among other things, tends to chill free speech and threatens to deter members and donors from associating with each other and contributing to the NRA's mission. Nor does the dismissal moot the NRA's request for fees incurred to assert and litigate the Counterclaims. As a result, when the Court issues a judgment on the NRA's Counterclaims, that judgment will directly and immediately affect the NRA's rights and interests, and the NRA's Counterclaims are therefore not moot. *See Id*. at 1206-7 (holding petitioners' claims were not moot).

Second, two months after the Court dismissed the dissolution claims, in a new claim added on May 2, 2022, the NYAG now seeks an unprecedented court order appointing an "independent compliance monitor" ***and*** a "governance expert" to oversee the administration of the NRA ***and all***

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pleading. *E.g.*, *Dime Sav. Bank v. Halo*, 210 A.D.2d 572, 573 (3d Dep't 1994); *see also* C:3025:5, McKinney's CPLR Rule 3025 ("The rejection should be made unambiguous by Y's returning the pleading to X with a statement of why it is being rejected.").

of its assets **under the supervision of the Court and none other than the AG**.[4] The NRA objects to the NYAG's new claim (the "Compliance Monitor Claim") for reasons it will detail in its forthcoming response (due on June 6). But, in sum, by asserting the Compliance Monitor Claim against the NRA, the NYAG is once again violating the NRA's and its members' constitutional rights. For example, there is *no* statutory or other legal basis for the AG to seek—or the Court to grant—the intrusive, disproportional, and unnecessary appointment of an independent compliance monitor or a "governance expert" in this case.[5] In fact, the OAG apparently sought a semblance of such intrusive relief in *a pleading*—as opposed to a settlement agreement or another consensual resolution—in only two other cases. And in the two cases where the NYAG sought a less intrusive version of what she seeks here implicated vastly different societal interests of preventing sexual abuse of children and injury from smoking to "the health and safety of a considerable number of persons."[6] As a result, although the dissolution claims were dismissed, the new claim the NRA faces just weeks after is also unconstitutional.

Finally, the Counterclaims allege *a pattern* of unconstitutional behavior by Attorney General James and other New York officials,[7] and the Compliance Monitor Claim is yet another manifestation of that pattern. *C.f.*, *N.Y. State Correctional Officers and Police Benev. Ass'n.*, 138 A.D.3d at 1206 ("minor amendments [that] narrowed the scope" of a challenged regulation did not moot action because the amendment did not meaningfully change the harm the petitioners' had suffered under the original regulation, nor did they "adversely affect[ ] or change[ ] the basis of petitioners' challenge to the regulatory requirement). Indeed, the NYAG's assertion of the Compliance Monitor Claim—after her dissolution claims were dismissed—further proves the

[4] Affirmation of Svetlana M. Eisenberg dated May 24, 2022 at ¶ 4 (**Exhibit A** hereto)

[5] The relief the NYAG seeks is disproportional because, as the Court noted during a different oral argument, on December 10, 2021, the NYAG's complaint against the NRA contains no allegations of any malfeasance in connection with any of the NRA's core mission-related activities. NYSCEF 545 at 25:23-26:7. Despite a complete lack of any allegations related to the majority of the NRA's activities and operations, the NYAG now seeks a say in the operation and administration of the entire Association and all of its assets.

[6] Compl. in *People of the State of New York v. Diocese of Buffalo*, at ¶ 741, No. 452354/2020 (N.Y. Sup. Ct.) (filed on Dec. 2, 2020); Am. Compl. at pages 31, 33, ¶¶ 137-38, *The City of New York and the People of New York v. FedEx Ground Package Sys., Inc.*, No. 14-cv-8985 (S.D.N.Y.) (filed on May 8, 2015) (asking the court to appoint a "Special Master to assure [defendant's] compliance" with specific New York statutes and any injunctive relief ordered by the court after noting that the NYAG had "no adequate remedy at law" in part because the defendant had previously entered into an Assurance of Compliance with the NYAG but later allegedly "show[ed] itself unable or unwilling to comply [with the assurance] voluntarily").

[7] NYSCEF 629 pages 3-7, 167-78, 179-215.

NYAG's retaliatory and otherwise unconstitutional motive before and throughout her investigation and this litigation.

The NYAG's only citation in support of mootness—*Hearst Corp. v. Clyne*—relates to an entirely different and procedurally inapposite situation. 50 N.Y.2d 707, 713-14 (1980) (cited by the NYAG (NYSCEF 660) at page 2). There, a newspaper instituted an Article 78 proceeding to challenge a judge's decision to seal a court proceeding. However, after plaintiff obtained a transcript of the hearing, the Court of Appeals held that the *appeal* became moot. In *Hearst*, unlike here, plaintiff did not seek damages, did not seek attorney fees, and did not allege that the government official engaged in a pattern of ongoing and continuing unconstitutional behavior. *Id*. Because the newspaper merely sought limited declaratory relief—along with undefined prospective relief in "future" cases—the release of the hearing transcript in *Hearst* understandably mooted the controversy. Here, in contrast, the dismissal of the dissolution claims does not undo the violation of the Constitution that has occurred, the damages it caused, or the fees incurred to defend the NRA's constitutional rights.

Also, an exception to mootness would apply here. There is "a likelihood of repetition" (see NYAG's new Compliance Monitor Claim), the phenomenon would typically "evad[e] review" (the unconstitutional claim dismissal for failure to plead), and the constitutional questions of officials' use of a statute for improper reasons as presented are significant, important, and novel. *See Matter of Elijah S.*, 163 N.Y.S.3d 460, 461 (2022).

C. The NRA's selective enforcement claims are sufficiently stated.

1. <u>The legal standard for selective enforcement claims is not as demanding as the NYAG claims.</u>

For the NRA's selective enforcement counterclaims to survive, the NRA must allege comparators that a "reasonably prudent" person deems "roughly equivalent." *Mosdos Chofetz Chaim v. Village of Wesley Hills*, 815 F. Supp. 2d 679, 696 (S.D.N.Y. 2011). The comparators must be "similar," but there is no requirement of a carbon copy. Rather, as the authority on which the NYAG herself relies says—*Mosdos Chofetz Chaim*—the required similarities must exist in "material" aspects. *Id.* at 696. Materiality of a similarity, in turn, turns on the regulatory concern purportedly at stake and the suspected unconstitutional motive. *See, e.g.*, *id.* at 698-701.

2. <u>Whether a case is materially similar in the context of a selective enforcement claim is a question for the jury.</u>

Generally, whether two cases "are similarly situated" is a fact issue for the jury. *Harlen Assocs. v. Inc. Vill. Of Mineola,* 273 F.3d 494, 499 n.2 (2d Cir. 2001). And, as the Second Circuit

has held, this rule is not absolute because "a court can properly grant ***summary judgment*** where it is clear no reasonable jury could find the similarly situated prong met." *Id*. (emphasis added).[8]

3. <u>Contrary to the NYAG's argument, the Counterclaims adequately allege several selective enforcement claims.</u>

The Counterclaims and the NRA's opposition to the Motion make clear that: (i) where the NYAG sought judicial dissolution, that typically occurred for sham or otherwise fraudulent entities in factual scenarios that are a far cry from the NYAG's allegations here;[9] (ii) in a multitude of *materially* similar cases, the NYAG did *not* seek dissolution and, instead, sought less draconian remedies contemplated by the law;[10] and (iii) the allegations in the three dissolution cases the NYAG puts forward as purportedly "materially similar" are not at all similar to the allegations here.[11]

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[8] *See also Figueroa v. Borough*, No. CV 3:21-601, 2022 WL 1143532, at *3 (M.D. Pa. Apr. 18, 2022) (in a First Amendment case, where *Nieves* was held to apply, ruling that a motion to dismiss was not the proper stage to decide matters of probable cause and government's motivation; stating that, rather, such a matter is "more appropriate for a summary judgement motion").

[9] NYSCEF 629 at ¶ 37.

[10] NYSCEF 629 at ¶ 39; during the oral argument on the Motion, Assistant Attorney General Connell represented to the Court that "the purported charities [comparators] cited by the NRA are not similar . . . most notably ***<u>all involve settlements</u>*** [in] which the charities agreed to overhaul their leadership." However, a closer look at the comparators alleged in the Counterclaims reveals that the NYAG's argument is misleading. Specifically, while the cases *ultimately* involved settlements, they occurred only later. The point for which the NRA cites these comparators is that at the stage at which the NYAG filed civil enforcement actions, unlike here, her office did *not* seek dissolution despite comparable allegations. *Compare Complaint, The People of the State of New York v. Kelli Conlin*, No. 451017/2012 (N.Y. Sup. Ct.) (filed on June 28, 2012) *with Stipulation and Order of Settlement*, No. 451017/2012 (N.Y. Sup. Ct.) (filed **617 days after the Complaint**, on Mar. 7, 2014); *compare* Complaint in *Schneiderman v. Thoroughbred Retirement Fund*, No. 401004/2012 (N.Y. Sup. Ct.) (filed on May 3, 2012) *with* Press Release, Office of the Attorney General, A.G. Schneiderman Announces Settlement of Lawsuit Against Thoroughbred Retirement Foundation for Past Fiscal Mismanagement and Neglect of Animals (showing that the complaint, which did not involve requests for dissolution, **preceded** the November 2013 settlement by **565 days**); *compare Complaint, Schneiderman v. O. Aldon James, Jr.*, No. 451488/2012 (N.Y. Sup. Ct.) (filed on Sept. 21, 2012) *with* Press Release, Office of the Attorney General, A.G. Schneiderman Obtains $950,000 Settlement from Former National Arts Club Leaders for Years of Self Dealing (settlement occurred only **292 days later**, on July 10, 2013).

[11] Affirmation at ¶ 5.

The NRA has, therefore, properly alleged the NYAG's enforcement of the N-PCL's dissolution statutes against the NRA was selective and improperly motivated. These allegations are buttressed by Attorney General James's repeated pledge to her supporters—while campaigning to become the Attorney General of New York—to "take down" the NRA based on her purported disagreement with the NRA's political speech.[12] Considered in the context of the numerous other allegations of impermissible bias,[13] the Counterclaims sufficiently allege the motive for the selective enforcement here was impermissible.

In its modest amendment to the Counterclaims, the NRA referenced three fraudulent New York-based charities for which public records apparently revealed no enforcement by the NYAG. In her letter, the NYAG avers, in the three cases, the NYAG in fact was part of resolutions that yielded dissolutions. However, the NYAG's argument only further underscores the NRA's point: When the NYAG seeks dissolution, such a decision invariably is reserved for "sham" or "deceptive" charities. NYSCEF 660 at p. 3 (in discussing the cases, where the NYAG sought dissolution, the NYAG references the dissolved entities as "sham cancer charities," a "deceptive veterans charity," and a "sham charity" that engaged in "fraudulent fundraising practices."

III.
CONCLUSION

For the reasons stated in the NRA's January 10, 2022 submission, at the oral argument on February 25, 2022, and above, the Court should deny the Motion. The only exception is the NRA's Seventh Counterclaim, which seeks a declaration that the N-PCL's dissolution provisions are unconstitutional as applied, which the NRA agrees is now moot.

The NYAG is deeply misguided in her argument that permitting the Counterclaims to survive will violate the separation of powers. To the contrary, where members of the executive branch usurp power to promote careers or political agendas, the check on such abuse is the judiciary.

Sincerely,

BREWER, ATTORNEYS & COUNSELORS

[12] *See, e.g.*, NYSCEF 629; NYSCEF 543 at n.1.

[13] *See, e.g.*, NYSCEF 629 at page 4 (Counterclaims stating that, just two months before the NYAG commenced her investigation of the NRA, senior NYAG representatives, including its Charities Bureau Chief, met with representatives of Everytown for Gun Safety Action Fund—a self-proclaimed "counterweight to the NRA"—to discuss the NRA and Everytown's allegations of impropriety at the NRA).

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