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VIA NYSCEF

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

Re: *People of the State of New York, by Letitia James, Attorney General of the State of New York v. The National Rifle Association of America, Inc. et al.,* Index No. 451625/2020

Dear Justice Cohen:

On behalf of the Plaintiff, the People of the State of New York by Attorney General Letitia James, the Office of the Attorney General ("OAG") respectfully submits this supplemental reply letter brief in further support of Plaintiff's motion to dismiss (Motion Sequence No. 13) the National Rifle Association of America's ("NRA") supplemental counterclaims (NYSCEF 629).

Argument

I. The NRA's Supplemental Counterclaims Are Procedurally Improper.

The NRA has failed to refute Plaintiff's argument that its supplemental counterclaims are improper because the NRA filed them without necessary court approval. The NRA has argued to this Court previously that its supplemental counterclaims should be treated as a separate complaint, distinct from the NRA's answer. *See* NYSCEF 455; *see also* NYSCEF 511 at 4:11-20 (the Court noting that "counterclaims are independent of the complaint"). Thus, it is of no moment whether the NRA was entitled to amend its answer to the OAG's Second Amended Complaint as of right—the question is whether the NRA was entitled to supplement its counterclaims as of right. The NRA could not have done so without the Court's leave pursuant to CPLR 3025(b). The NRA's supplemental counterclaims are thus procedurally improper and should be disregarded.

The NRA's suggestion that post-filing leave of court should be granted should also be rejected. As detailed below and in the OAG's other papers in support of its motion to dismiss the counterclaims, the NRA's supplementation of its counterclaims is futile. *See Silverstein v.*

Pillersdorf, 199 A.D.3d 539, 540 (1st Dep't 2021) (holding that Supreme Court properly denied leave to amend as futile "[g]iven plaintiff's conclusory allegations").

II. The NRA's Requests for Injunctive and Declaratory Relief Are Moot.

The NRA admits that its requests for declaratory and injunctive relief—which all relate to the dismissed dissolution claims—are moot. NYSCEF 674 at 3. This leaves only the NRA's claims to recover monetary damages. All three arguments the NRA offers to save its counterclaims for such relief from dismissal are meritless.

First, as argued in the OAG's moving papers and supplemental letter brief, the NRA's claims for monetary relief against the Attorney General in her individual capacity fail both to state a claim on the merits and because the Attorney General is entitled to qualified and absolute immunity. *See* NYSCEF 279 at 34-36; NYSCEF 560 at 16-17; NYSCEF 660 at 2. The NRA points to no other relief it is seeking in its counterclaims (NYSCEF 674 at 3), and so, absent a viable damages claim, the entirety of the NRA's supplemental counterclaims must be dismissed.

Furthermore, the NRA cannot rely on its request for attorneys' fees under either CPLR 8601 or 42 U.S.C. § 1988 to save its counterclaims, since dismissal of a claim as moot makes unavailable any award of attorneys' fees under either statute. *See Wittlinger v. Wing*, 289 A.D.2d 171, 171 (1st Dep't 2001) (upholding denial of attorneys' fees sought under CPLR Article 86 and 42 U.S.C. § 1988 since plaintiff was not a "prevailing party" after claims were dismissed as moot); *see also* NYSCEF 560 at 9-10 (arguing that the NRA has failed to allege how it suffered any injury that is distinct from the costs incurred in connection with unchallenged causes of action in this litigation).

Second, the NRA inappropriately points to unpled defenses to the OAG's Second Amended Complaint in an effort to save moot claims. NYSCEF 674 at 3-4 (arguing that the claim added in the OAG's Second Amended Complaint unconstitutional). The NRA has failed to carry its pleading burden of demonstrating how the OAG is unconstitutionally selectively enforcing Estates, Powers and Trusts Law § 8-1.4 against the NRA. Without citing to any authority, the NRA suggests that the OAG must make "allegations related to the majority of the NRA's activities and operations" to bring this claim. NYSCEF 674 at 4 n.5. Even assuming that were true, the NRA fails to allege, because it cannot, that the two OAG actions cited by the NRA as purported comparators—involving the Diocese of Buffalo and FedEx Ground Package Systems, Incorporated—themselves involved allegations about the "majority" of their respective activities and operations.

Moreover, as this Court held, the OAG has detailed in its complaint pervasive wrongdoing, specifically:

> The Attorney General's allegations in this case, if proven, tell a grim story of greed, self-dealing, and lax financial oversight at the highest levels of the National Rifle Association. They describe in detail a pattern of exorbitant spending and expense reimbursement for the personal benefit of senior management, along with conflicts of interest, related party transactions, coverups, negligence, and

> retaliation against dissidents and whistleblowers who dared to investigate or complain, which siphoned millions of dollars away from the NRA's legitimate operations.

NYSCEF 609 at 1. The relief sought by the OAG to address this misconduct in its Second Amended Complaint is exactly the relief that counsel for the NRA, during argument on the motion to dismiss the counterclaims, noted was consistent with other OAG's enforcement actions: "In addition, you have cases where . . . the Attorney General sought reform and monitorships and all of those things. In other words, there was a real emphasis on recognizing the legacy of a corporation and the social purpose that it serves and helping it survive given that." NYSCEF 625 at 42:19-24.

Third, the NRA's arguments for an exception to mootness are conclusory and meritless. NYSCEF 674 at 4-5. To overcome mootness, the NRA must demonstrate "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues." *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714-15 (1980). The NRA has failed to establish how it meets any of the three elements.

With respect to the likelihood of repetition, the NRA has failed to show how the OAG's request for court-supervised compliance and governance monitors is a repetition of the dismissed dissolution claims. The only authority cited by the NRA in support of this argument, *Matter of New York State Correctional Officers & Police Benevolent Association, Inc. v. New York State Office of Mental Health*, is inapposite. 138 A.D.3d 1205 (3d Dep't 2016). There, the Third Department addressed challenges to a temporary regulation that was codified, and separately challenged, in a permanent regulation that was virtually identical to the temporary regulation. *Id.* at 1207. Here, the OAG has not appealed the Court's order dismissing the dissolution claims, and the NRA's conclusory attempt to conflate monitorships with dissolution do not establish the required likelihood of repetition.

Furthermore, NRA provides no authority for its argument that a constitutional question "typically evade[s] review" by being subject to a motion to dismiss. *Hearst*, 50 N.Y.2d at 715. Nor does the NRA provide any explanation for how this case raises "significant or important questions not previously passed on." *Id*.

The NRA's counterclaims seeking declaratory and injunctive relief are moot, and its claims for damages fail both on the merits and because the Attorney General is entitled to absolute and qualified immunity.

III. The NRA's Selective Prosecution Claim Fails as a Matter of Law.

Provided with another opportunity to demonstrate how any of the comparators alleged in its supplemental counterclaims are relevant, the NRA has failed to do so once again. The NRA's conclusory statement that it alleges "a multitude of materially similar cases" (NYSCEF 674 at 6 (emphasis omitted)) falls short of its pleading burden. *See People v. The Trump Org.*, -- N.Y.S.3d --, 2022 WL 1668850 (1st Dep't May 26, 2022) ("Appellants have not identified any similarly implicated corporation that was not investigated or any executives of such a corporation who were

not deposed. Therefore, appellants have failed to demonstrate that they were treated differently from any similarly situated persons."); *Jarrach v. Sanger*, 2010 WL 2400110, at *8 (E.D.N.Y. June 9, 2010) ("Conclusory allegations of selective treatment are insufficient to state an equal protection claim.").

First, the NRA argues that examples of purportedly similar enforcement actions should be considered materially similar even though those actions resulted in settlements. NYSCEF 674 at 6 n.10. But the NRA's attempt to create similarity between this action and those other matters fail, and instead support the OAG's arguments.

For example, the referenced lawsuit against Kelli Conlin was brought against an individual senior officer of a charity after her employer conducted a forensic audit of her activities, resulting in her stepping down from the organization. See *People v. Conlin*, Index No. 451017/2012 (NYSCEF 1 at PDF page 7). And the referenced lawsuit against O. Aldon James, Jr. was brought after the National Arts Club had ousted Mr. James, its former president. *See People v. James*, Index No. 451488/2012 (NYSCEF 61 at PDF page 8). The NRA's failure to take any disciplinary action against Defendants LaPierre, Frazer, and Phillips, and its decision to close ranks to protect them at the expense of the organization, makes this case materially different from the NRA's purported comparators.

Second, the NRA cannot shift its burden to the OAG by suggesting that the OAG has failed to provide examples of materially similar entities that the OAG sought to dissolve. NYSCEF 674 at 6. It is the NRA's burden to "adequately allege[] that any of their . . . proffered comparators is similarly situated in all material respects and that a prudent person would think it roughly equivalent." *Mosdos Chofetz Chaim*, *Inc. v. Village of Wesley Hills*, 815 F.Supp.2d 679, 697 (S.D.N.Y. 2011).

The NRA attempts to have it both ways. The NRA's supplemental counterclaims allege, as evidence of bias, that the OAG failed to prosecute publicly reported instances of misconduct carried out by charities. *See* NYSCEF 629 at counterclaims ¶ 24 (identifying purported comparator charities involving public reporting of corrupt leadership where the OAG allegedly did not take any enforcement action). In response, the OAG provided judicially noticeable evidence that it did, in fact, bring enforcement actions against charities identified by the NRA, undercutting its argument of bias. NYSCEF 660 at 3. The NRA now argues that those charities, which it itself identified as comparators, are not materially similar to it. NYSCEF 674 at 7. The NRA's flip-flopping demonstrates its consistent conflation of legitimate prosecutorial discretion with alleged selective enforcement.

As the Court noted during oral argument, the Court has and will continue to "preside over [the OAG's] claims as they are brought and if they don't have merit . . . get rid of them." NYSCEF 625 at 32:18-20. That is the appropriate method for handling the OAG's detailed allegations of corrupt leadership and mismanagement of the NRA, rather than "open up a vein, a new litigation within the litigation" where the Court must examine "all of the motivations that went into this case, [as well as] the motivations that went into all" of the NRA's alleged comparators. *Id*. at 34:14-15, 37:3-4. This is particularly true here, where the NRA cannot stay consistent as to what is and is not a comparator on its selective enforcement claim.

Conclusion

For the reasons set forth in Plaintiff's prior submissions in support of Motion Sequence No. 13 and herein, the NRA's supplemental counterclaims should be dismissed in their entirety and the Court should order such other and further relief as it deems just and proper.

* * *

Pursuant to Your Honor's May 23, 2022 order (NYSCEF 673), I certify that the body of this supplemental letter brief is 1883 words in length using Microsoft Word's word count function.

Respectfully,

/s Monica Connell
Monica Connell
Assistant Attorney General

cc: All Counsel of Record