**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK**

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| **PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,** | § | |
| **Plaintiff,** | § | **INDEX NO. 451625/2020** |
| **v.** | § | **ORAL ARGUMENT: SEPTEMBER 29, 2022** |
| **THE NATIONAL RIFLE ASSOCIATION OF AMERICA, WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,** | § | **MOTION SEQUENCE 30** |
| **Defendants.** | § | |

**THE NATIONAL RIFLE ASSOCIATION'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE NATIONAL RIFLE ASSOCIATION'S MOTION TO DISMISS THE FIRST CAUSE OF ACTION OF THE SECOND AMENDED VERIFIED COMPLAINT**

William A. Brewer III
Svetlana M. Eisenberg
Blaine E. Adams
**BREWER, ATTORNEYS & COUNSELORS**
750 Lexington Avenue, 14th Floor
New York, New York 10022
Telephone: (212) 489-1400
Facsimile: (212) 751-2849

**COUNSEL FOR THE NATIONAL RIFLE ASSOCIATION OF AMERICA**

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## I. PRELIMINARY STATEMENT

In the NRA's motion to dismiss the NYAG's newly added Independent Compliance Monitor Claim (the "Motion," NYSCEF 705),[1] the Association explained that there are four separate and independent reasons for the Court to dismiss that claim with prejudice.

In her opposition (the "Opposition," NYSCEF 768), as explained below, the NYAG attempted to refute the NRA's arguments but to no avail. The Opposition cites inapposite authorities and misconstrues the significance of the relevant statute's legislative history.

As a result, there are four independent bases on which the Court can and should dismiss the claim.

## II. ARGUMENT

### A. The NYAG failed to demonstrate that EPTL 8-1.4(m) empowers her to pursue the injunctive relief sought.

#### 1. The authorities the NYAG cites do not establish that EPTL 8-1.4(m) creates a cause of action or a remedy.

As an initial matter, the Second Amended Verified Complaint (the "SAC," NYSCEF 646) alleges that the NRA "breach[ed]" EPTL 8-1.4(m) (*see* SAC, First Cause of Action), yet fails to point to a requirement or an obligation in EPTL 8-1.4(m) that was allegedly breached (SAC at ¶¶ 635-43). Indeed, in an apparent oversight that the Opposition does not even attempt to explain, the NYAG's own recitation in the SAC of a non-profit corporation's statutory obligations ***omits*** any discussion of EPTL 8-1.4(m) (SAC at ¶¶ 33-45).

In her Opposition, unlike in her complaint, the NYAG asserts that EPTL 8-1.4(m) imposes on corporations a general requirement to "administer" themselves "properly" and that alleged

[1] Capitalized terms not defined here have the meaning ascribed to them in the Memorandum of Law in Support of the National Rifle Association's Motion to Dismiss the First Cause of Action of the Second Amended Verified Complaint (NYSCEF 705).

failure to meet this vague and subjective standard empowers the NYAG to obtain intrusive mandatory injunctive relief. NYSCEF 768 at page 8; SAC at ¶¶ 33-45. Yet, the authorities she cites for that proposition do not support it.

According to the NYAG, it is apparently "well established" that EPTL 8-1.4 imposes a duty on trustees to administer charitable assets properly and that the Attorney General can enforce this purported duty by asserting a claim under EPTL 8-1.4(m). NYSCEF No. 768 at page 10. Based on the NYAG's representations, one might conclude that the issues were litigated and resolved conclusively in the NYAG's favor. Not so. In *People v. Trump*—cited by the NYAG (NYSCEF No. 768 at page 7)—defendants ***did not*** argue, as the NRA does here, that EPTL 8-1.4(m) does not impose a separate obligation on the part of a trustee that the NYAG can enforce pursuant to EPTL 8-1.4(m). 62 Misc.3d 500, *passim* (N.Y. Sup. Ct. 2018) ("*Trump I*"). Rather, in *Trump I*, defendants asked the court to dismiss the claim on the unrelated grounds that "the funds [at issue had been] eventually disbursed to charities." *Id.* at 511. In rejecting that argument and sustaining the NYAG's claim in *Trump I*, the court did not resolve or even weigh in in *dicta* on the issue facing the Court here. Therefore, the NYAG's reliance on a passing reference in that opinion is entirely misplaced. *See id.* at 510-11.

Similarly, *Matter of People v. Trump* ("*Trump II*")—cited by the NYAG at page 11—carries no precedential weight either. 66 Misc.3d 200 (N.Y. Sup. Ct. 2019). In *Trump II*, as the court's opinion explains, the Attorney General and the individual defendants had consensually resolved "the bulk of the proceeding," and "the sole . . . issue" before the court was "the amount of any additional payment owed by [a defendant]" under EPTL 8-1.4, N-PCL 717, and N-PCL 720. *Id.* at 203. Therefore, as in *Trump I*, the court's statement in *Trump II* that "a trustee of . . . the charitable assets" is "responsible for [their] proper administration . . . pursuant to EPTL 8-1.4" is

neither apposite nor precedential. *See id.* at 204 (quoted and relied on by the NYAG, NYSCEF 768, at page 10).

For the same reasons, other cases cited by the NYAG likewise carry no precedential weight. For example, the NYAG cites *People ex rel. Schneiderman v. Lower Esopus River Watch, Inc.* ("*LERW*"), No. 08-5067, 2013 WL 3014915 (N.Y. Sup. Ct. Apr. 8, 2013). But briefing in that case makes clear that there was only one defendant who had not settled the NYAG's claims and that he never raised any arguments regarding the interpretation of EPTL 8-1.4(m) that are at issue here. Reply Memorandum of Law in Further Support of the Attorney General's Motion for Summary Judgement, at 31-33, *LERW*, (May 15, 2012) (No. 2008-5067); *see also Abrams v. New York Foundation for the Homeless*, 190 A.D.2d 578, 578 (1st Dep't 1993) (an action by the Attorney General for a preliminary injunction to prohibit defendants from making ***unregistered*** solicitations because, unlike here, they had not complied with the registration requirements of EPTL 8-1.4).

Finally, the NYAG's reliance on the statute's legislative history to urge its expansive interpretation is similarly misplaced. Contrary to the NYAG's argument, with few exceptions inapplicable here,[2] there is no basis to conclude that "section 8-1.4 was enacted to" "enhance" or "expand" "the Attorney General's enforcement powers" by creating new obligations, causes of action, or judicial remedies. NYSCEF 768 at page 8. The legislative history appended to the

[2] For example, the fourth sentence of EPTL 8-1.4(m) states: "The failure of any trustee to register or to file reports as required by this section may be ground for judicial removal of any person responsible for such failure." This provision is fairly read to create a judicial remedy of removal of any person responsible for a trustee's failure to register or file reports as required by EPTL 8-1.4. In contrast, the first sentence of EPTL 8-1.4(m) does not refer to a specific obligation, cause of action, remedy, or—for that matter—the judiciary. *See also* EPTL 8-1.4(k) (giving the Attorney General the power to seek relief under CPLR 2308(b) against a person disobeying the mandate of an investigative subpoena issued under EPTL 8-1.4).

NYAG's opposition quotes then-Attorney General Lefkowitz observing with chagrin that, while the pre-existing statutes bestowed upon his office "enforcement . . . functions," the enforcement functions "[had] been energized primarily by random complaints . . . or . . . court proceedings."[3] "This state of affairs," according to the Attorney General, "[was] created by ***the lack of legislation which grants specific supervisory and investigative powers*** to the Attorney General."[4] The solution was to create statutory "registration [and] reporting" obligations and "supervisory procedures" to put the Attorney General "in a position to ***determine*** whether or not all charitable property is being administered properly."[5] Thus, EPTL 8-1.4 was enacted not to create new obligations, causes of action, or judicial remedies (which already existed in spades),[6] but instead to grant the Attorney General the supervisory and investigative powers necessary to know when a breach of a pre-existing statutory obligation occurred.

To support her contrived argument, the NYAG cherry-picks Attorney General Lefkowitz's words so as to give the appearance that they support her invented interpretation of the statute.[7] The full quote of his comments makes that clear:

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[3] Memorandum of State Department of Law, McKinney's 1966 Session Laws of New York, vol. 2, at 2928, 2930 (189th Session – 1966), Connell Aff. Ex. C (NYSCEF 760 at page 2), attached to the Affirmation of Svetlana M. Eisenberg, dated August 15, 2022 as Exhibit A, with relevant passages highlighted for the Court's convenience.

[4] *Id*.

[5] *Id*. (emphasis added).

[6] NYSCEF 768 at page 9 (stating that "[a]t the time § 8-1.4 was adopted in 1966, the Attorney General had enforcement power over charitable organizations and could bring actions for "a ***variety of remedies***, including [but not limited to] [1] injunction, [2] accounting, [3] removal and [4] surcharge").

[7] NYSCEF 768 at page 9 (asserting that "in his memorandum seeking adoption of what would become [EPTL] 8-1.4, Attorney General Lefkowitz argued that the new statutory section . . . was 'not only desirable but necessary' in order for the Attorney General's office to fulfill its enforcement functions with respect to charities").

> In view of the fact that there is ***no registry*** of charitable trusts or charitable corporations in this state, ***nor any reporting, accounting or supervisory procedure*** (except as to solicitation activities), the possible, if not actual, abuses of charitable funds are limitless.[8] If the Attorney General is to carry out his [pre-existing] function of enforcing dispositions for charitable purposes, whether in trust or corporate form, ***the enactment of the attached proposed bill is*** not only desirable but ***necessary***.[9]

**2. <u>EPTL 8-1.4(m) does not create a distinct cause of action or a remedy.</u>**

The NYAG also argues that the statute cannot be construed to confer standing on the NYAG (which the NRA agrees the statute does) without simultaneously creating a cause of action and a remedy. On Page 13 of the Opposition, the NYAG states:

> The NRA acknowledges that EPTL § 8-1.4(m) "should be construed as giving the Attorney General standing to pursue remedies for breaches of duties that exist otherwise." (NYSCEF 705 at 7.) Although this interpretation is still too narrow because, as set forth above, Section 8-1.4 was enacted to enhance the Attorney General's enforcement powers, not merely restate them, ***it is fatal to the NRA's argument*** because, as the NRA acknowledges, (see id. at 7-8), the Second Amended Complaint cites to the NRA's failure to comply with numerous obligations imposed by the EPTL, N-PCL and Executive Law in support of the claim that it failed to administer charitable assets properly. (NYSCEF 646 ¶¶ 641-42.)

The NYAG's argument, however, is flawed because it conflates distinct concepts of standing, the existence of a cause of action, and the existence of a remedy. *See Bond v. United States*, 564 U.S. 211, 218 (2011) ("[T]erms 'cause of action' and 'standing' [are] distinct concepts

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[8] Notably, in her Opposition, the NYAG concedes that "the [SAC] does not allege that the NRA breached any of its obligations" under EPTL 8-1.4(d), (e), (f), or (g), which impose obligations to file instruments with the NYAG, provide notices to the NYAG, and file written annual financial reports with the NYAG on a specified schedule. NYSCEF 705 at page 3.

[9] Memorandum of State Department of Law, McKinney's 1966 Session Laws of New York, vol. 2, at 2930 (189th Session – 1966), attached hereto as Exhibit Connell Aff. Ex. C (NYSCEF 760 at page 4) (emphasis added).

Indeed, even the title of EPTL 8-1.4 refers to "***[s]upervision*** of Trustees for Charitable Purposes."

[although they] can be difficult to keep separate."); *see also US Bank Nat'l Ass'n v. Nelson*, 36 N.Y.3d 998, 1005 (2020) (Wilson, J., concurring) (citing *Bond v. United States* and noting that "[t]he U.S. Supreme Court . . . cautioned against confusing standing with the existence of a cause of action."). The Attorney General, "like all other parties to actions, must show an interest in the subject-matter of the litigation to entitle [her] to prosecute a suit and demand relief." *People ex rel. Spitzer v. Grasso*, 54 A.D.3d 180, 198 (1st Dep't 2008) (citing *People v. Lowe*, 117 N.Y. 175, 191 (1889)). Contrary to the Opposition, that the phrase "may institute appropriate proceedings . . . to secure proper administration of . . . a corporation" confers on the NYAG standing is not "fatal to the NRA's argument" (NYSCEF 768 at page 13) because that phrase does not at the same time create a cause of action nor does it create a remedy.[10]

The alleged wrong that the Attorney General claims was committed and the relief that the Attorney General seeks against the NRA—or any other defendant—must be separately created and authorized. The relevant phrase in the first sentence of EPTL 8-1.4(m) does neither of those two

[10] Multiple additional sources make clear that all the provision does is confer standing. The Fiduciary Duties of Directors, 105 Harv. L. Rev. 1590, 1595 & n.29 (1992) (relying on statement in the Uniform Supervision of Trustees for Charitable Purposes Act (1954) that "[t]he Attorney General may institute appropriate proceedings . . . to secure the proper administration of any . . . relationship to which this act applies" for the proposition that "[t]ypically, statutes ***vest the power to enforce*** the duties of the trustees of charitable trusts in state attorneys general" (emphasis added)); Issues Regarding Corporate Structure, IRS Approval, State Regulation, Liability, Governance & Operation of New York & Delaware Nonprofits, 20100608A NYCBAR 1, 78 (characterizing EPTL 8-1.4(m) as part of the "Attorney General['s] broad ***statutory authority*** to prosecute and defend legal actions to protect the interests of the State and the public") (emphasis added), attached to the Affirmation of Svetlana M. Eisenberg, dated August 15, 2022, as Exhibit B; *see also* EPTL 8-1.1(a) ("(a) No disposition of property for . . . charitable . . . purposes, otherwise valid under the laws of this state, is invalid by reason of the indefiniteness or uncertainty of the persons designated as beneficiaries."); EPTL 8-1.1(f) (in another provision that simply confers standing, stating that "[t]he attorney general shall represent the beneficiaries of such dispositions for . . . charitable . . . purposes and it shall be his ***duty to enforce the rights of such beneficiaries by appropriate proceedings in the courts***.") (emphasis added).

things. The phrase "to secure proper administration . . . of [a] corporation" is simply too vague. Indeed, elsewhere in the SAC, the NYAG invokes a multitude of other statutes that create causes of actions and remedies that the NYAG has standing to pursue (NYSCEF 646 at ¶¶ 29, 32). Apparently not satisfied with the remedies those statutes empower her to seek, the NYAG urges the Court to read EPTL 8-1.4(m) expansively to create an unidentified menu of injunctive remedies for conduct that can be deemed to constitute "improper administration of a corporation."

Multiple provisions of the EPTL, the N-PCL, and the Executive Law, however, make clear that, when the legislature intends to create a cause of action or a remedy, it uses significantly more specific language to do so. For example,

- The fourth sentence of EPTL 8-1.4(m) empowers the Attorney General to seek judicial "removal" of any persons responsible for trustee's failure to file reports required by EPTL 8-1.4.

- Under EPTL 8-1.9(c)(4), "[t]he attorney general may bring an action to enjoin, void or rescind any related party transaction . . . that violates any provision of this article or was otherwise not reasonable or in the best interests of the trust at the time the transaction was approved, or to seek restitution, and the removal of trustees or officers, or seek to require any person or entity to [perform certain specified acts]."

- Under N-PCL 720(a), "[a]n action may be brought against one or more directors, officers, or key persons of a corporation to procure a judgment for the following relief: (1) To compel the defendant to account for his official conduct in the following cases: (A) The neglect of, or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his charge. (B) The acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect of, or failure to perform, or other violation of his duties. (2) To set aside an unlawful conveyance, assignment or transfer of corporate assets, where the transferee knew of its unlawfulness. (3) To enjoin a proposed unlawful conveyance, assignment or transfer of corporate assets, where there are reasonable grounds for belief that it will be made.); *see also* N-PCL 720(b) (in a companion provision, conferring standing on the NYAG by stating that "[a]n action may be brought for the relief provided in this section . . . by the attorney general . . . :").

- Exec. Law 175(2) ("In addition to any other action or proceeding authorized by law and any action or proceeding by the attorney general, the attorney general may bring an action . . . in the name and in behalf of the people of the state of New York, against a charitable organization . . . to enjoin such organization . . . from continuing

> the solicitation . . . of funds . . . whenever the attorney general shall have reason to believe that the charitable organization . . . has violated any of the provisions of this article.").

In contrast, in the relevant portion of the first sentence of EPTL 8-1.4(m), the legislature did not use such specific language and did not create a separate cause of action or a separate remedy. The First Cause of Action therefore must be dismissed.

**B. EPTL 8-1.4(m) does not empower the NYAG to obtain the intrusive and unprecedented remedies the NYAG seeks here.**

In the Motion, the NRA also argued that the First Cause of Action should be dismissed because EPTL 8-1.4(m)—the statute on which the NYAG relies—does not authorize the Court to appoint an independent compliance monitor or an independent governance expert (in relative contrast to other statutes, such as the N-PCL, which specifically empowers the Court to install—in circumstances inapplicable here—a receiver (*see* N-PCL 1203)).

In her Opposition, the NYAG does not dispute that "there [is not] a single case . . . in which a New York court granted pursuant to EPTL 8-1.4(m)—or any law—the appointment of a compliance monitor or a governance expert ***against the corporation's will***." NYSCEF 705 at page 15. The NYAG instead argues—without any support—that the Court is "empowered by the EPTL, the State Constitution, and the Judiciary Law" to issue unlimited injunctive relief and that doing so would be "consistent with EPTL 8-1.4's broad grant of supervisory powers to the Attorney General." NYSCEF 768 at page 13.

As the Court of Appeals' opinion in *Spitzer v. Grasso* makes clear, when the Attorney General purports to rely on "legislative policy judgments," she must show them to have been "calculated." 11 N.Y.3d 64, 71 (2008). Here, the NYAG's reliance on the Court's general "power . . . to issue appropriate injunctive relief" (NYSCEF 768 at page 19) falls short.

**C. The First Cause of Action should be dismissed because the NYAG does not allege that any of the NRA's assets are in New York and fails to show that the legislature intended EPTL 8-1.4(m) to have any extra-territorial reach.**

As explained in the Motion, the Court should dismiss the First Cause of Action for the additional reason that it asks for broad relief over all of the NRA's assets, yet nowhere in the SAC does the NYAG allege that all, most, some—or, in fact, any—of such assets are, were bequeathed, or were intended by the donors to be used in New York. Nor does the SAC claim that the NYAG's purported powers under EPTL 8-1.4(m) extend to all of the NRA's assets regardless.

In the Opposition, the NYAG does not deny that the First Cause of Action seeks relief with respect to all of the NRA's assets. NYSCEF 768 at page 19-20. Nor does she claim that she adequately pleaded that any of the NRA's assets are in New York. *Id.* She argues, instead, that her pleading failure does not bar her from seeking relief with regard to all such assets because "there is no requirement in EPTL 8-1.4 that the assets held by New York corporations be held in New York in order for the Attorney General to supervise those corporations." NYSCEF 768 at page 20.

This argument fails for two reasons. ***First***, "the settled rule of statutory interpretation," is "that unless expressly stated otherwise, no legislation is presumed to be intended to operate outside the territorial jurisdiction of the state . . . enacting it." *Goshen v. Mut. Life Ins. Co. of New York*, 730 N.Y.S.2d 46, 47 (1st Dep't 2001) (internal citations and quotations omitted), *aff'd*, 98 N.Y.2d 314 (2002); *S.H. v. Diocese of Brooklyn*, 167 N.Y.S.3d 171, 177 (2nd Dep't 2022) ("every statute in general terms is construed as having no extraterritorial effect"; "New York recognizes the general rule that a statute is presumed to apply only within the [s]tate") (internal citations omitted); *see also Rodriguez v. KGA Inc.*, 64 N.Y.S.3d 11, 13 (1st Dep't 2017) ("Since these statutes do not expressly apply on an extraterritorial basis, plaintiffs' claims under these provisions, based on

labor performed exclusively outside New York, do not state a cause of action under Article 6 or Article 19 of the New York Labor Law") (internal citations omitted).

As a result, the NYAG's argument that "***the NRA*** does not cite any authority . . . in support of its argument that the Attorney General must allege that the NRA's assets are physically in New York" (NYSCEF 768 at page 20) misses the point. It is the Attorney General's burden to show express legislative intent of the statute's extraterritorial application. Because she has not done so, her First Cause of Action should be dismissed.

***Second***, the NYAG claims that, "to ***supervise*** . . . corporations," she is not required by EPTL 8-1.4 to show that the assets held by New York corporations are held in New York. NYSCEF 768 at page 20. The issue here, however, is not whether the NYAG has authority to exercise her ***supervisory*** powers under EPTL 8-1.4. Rather, the issue is whether the NYAG can ask the Court to impose mandatory injunctive relief as against the assets of a supervised corporation even to the extent that they are located outside of New York.

**D. Considerations under the First Amendment to the United States Constitution also militate in favor of dismissal.**

In the Motion, the NRA also argued (NYSCEF 705 at page 21)—and the NYAG's Opposition does not dispute—that (i) in exercising discretion to award equitable relief, courts "should consider [the] effect [of such relief] on First Amendment rights" (NYSCEF 611 at page 26); and (ii) this Court expressly did so when it dismissed the NYAG's requests to dissolve the NRA (*id.*).

The NYAG claims, however, that the NRA's "conclusory" concern about the equitable remedies' effect on First Amendment rights needs "expla[nation]." NYSCEF 768 at page 20. She then asserts without any explanation that "the injunctive relief sought ***will not infringe*** on the NRA's and its members' constitutional rights." NYSCEF 768 at page 20.

Here, unlike in *New York Foundation for Homeless*—the sole authority the NYAG cites (NYSCEF 768 at page 20)—the NRA's assertion of First Amendment privileges is not a "mere utterance," nor will it "shield defendants from the scrutiny of the Attorney General." After all, she targeted the NRA because of the substance of its constitutionally protected speech. In 2018, Attorney General James pledged to "take on" the NRA and businesses that support it.[11] She proclaimed that her "investigat[ion]" of the NRA's "non-profit status" will "help ensure another life isn't lost to senseless gun violence."[12] And, in 2021, Attorney General James again touted her "work[] to ***eliminate*** the NRA" as the reason New Yorkers should elect her as Governor.[13]

Yet, she now asks the Court to order the NRA to pay an independent compliance monitor and an independent governance expert to oversee the "administration of the NRA" under this Court's and ***her*** supervision. NYSCEF 646 at ¶¶ 635-643, pages 174-76. There can be no doubt that, under any circumstances, such state action is "likely to affect adversely the ability of [an advocacy group] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate" and places a "substantial restraint" on the exercise of their First Amendment rights. *NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958). Here, given the NYAG's demonstrated animus towards the NRA's constitutionally protected speech, the First Amendment implications are profound and undeniable.

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[11] *See Attorney General Candidate, Public Advocate Letitia James*, Our Time Press (Sept. 6, 2018), attached to the Affirmation of Svetlana M. Eisenberg, dated August 15, 2022, as Exhibit C.

[12] Letitia James (@TishJames), Twitter (Nov. 8, 2018), https://twitter.com/TishJames/status/1060599506608234497, attached to the Affirmation of Svetlana M. Eisenberg, dated August 15, 2022, as Exhibit D.

[13] Savannah Rychcik, *New York Attorney General Letitia James Announces She Will Run for Governor*, Independent Journal Review (October 29, 2021), https://ijr.com/new-york-attorney-general-letitia-james-run-governor, attached to the Affirmation of Svetlana M. Eisenberg, dated August 15, 2022 as Exhibit E.

## III. CONCLUSION

For the foregoing reasons, and those set forth in the NRA's moving papers, the Court should dismiss the NYAG's First Cause of Action with prejudice.

Dated: August 15, 2022

Respectfully submitted,

By: /s/ *Svetlana M. Eisenberg*

William A. Brewer III
wab@brewerattorneys.com
Svetlana M. Eisenberg
sme@brewerattoneys.com
Blaine E. Adams
bea@brewerattorneys.com

**BREWER, ATTORNEYS & COUNSELORS**
750 Lexington Avenue, 14th Floor
New York, New York 10022
Telephone: (212) 489-1400
Facsimile: (212) 751-2849

**ATTORNEYS FOR THE NATIONAL RIFLE ASSOCIATION OF AMERICA**

**Certification of Compliance with Word Count**

I, Svetlana M. Eisenberg, an attorney duly admitted to practice law before the courts of the State of New York, certify that the foregoing memorandum of law complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)), as increased to 6,000 words pursuant to the Court's Order entered August 11, 2022 (NYSCEF 827), because it contains 4,063 words, excluding the parts exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law.

By: */s/ Svetlana M. Eisenberg*
Svetlana M. Eisenberg