SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – COMMERCIAL DIVISION

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,	§	Index No. 451625/2020
	§	Hon. Joel M. Cohen
Plaintiff,	§	Motion Sequence No. _____
v.	§	
THE NATIONAL RIFLE ASSOCIATION OF AMERICA, WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,	§	**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO EXCLUDE EVIDENCE FROM ERICA HARRIS**
Defendants.	§	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT THE NATIONAL RIFLE ASSOCIATION OF AMERICA'S MOTION TO EXCLUDE EVIDENCE FROM ERICA HARRIS

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COMES NOW Defendant the National Rifle Association of America ("NRA") and submits this memorandum of law in support of its motion to exclude evidence intended to be offered by Plaintiff Attorney General of the State of New York ("NYAG") through its expert witness Erica Harris ("Harris").

PRELIMINARY STATEMENT

Harris should be precluded from testifying at trial and all evidence related to her analysis excluded. Her entire analysis is based on data that is manipulated to support her (and the NYAG's) preformed opinions. Likewise, Harris's methodology is improperly designed to support the conclusion that the NRA is an outlier among nonprofit organizations. In the end, Harris attempts to usurp the role of the factfinder by making conclusions that are unsupported by the data and her own analysis.

Harris's Report[1] and proffered testimony is merely a ruse for the NYAG to use skewed statistical analysis to "prove" that the NRA violated certain IRS requirements and is "abnormal" among nonprofit organizations. However, Harris's Report and testimony is neither relevant nor helpful to the trier of fact in determining whether the NRA requires monitoring by an independent entity to ensure its compliance with nonprofit requirements and regulations. Harris's analysis offers no relevant data or conclusions regarding the current status of the NRA and its compliance programs. And, in fact, the analysis conclusively proves that the NRA's commitment to good governance has led it to become a transparent and compliant organization.

Additionally, Harris's statistical analysis is inherently flawed and unreliable. It is based on data that excludes organizations that infamously reported private inurement during the relevant

[1] "The Expert Report Of Erica Harris," dated September 16, 2022, is referred to herein as the "Report" and attached as part of Ex. A to the Affirmation.

timeframe. By excluding these organizations, Harris accomplishes the result sought by the NYAG—to depict the NRA as an "outlier" and "abnormal" among nonprofit organizations. Importantly, and contrary to her normal practice, Harris fails to publish the limitations of her analysis. This is noteworthy because the basis of Harris's analysis—the Form 990—is susceptible to false reporting and underreporting of private inurement interactions. Harris's failure to disclose these limitations presents a significant likelihood of misleading the trier of fact. In sum, Harris's conclusions are based on flawed, unreliable, and manipulated data and should be excluded.

Finally, Harris intends to impermissibly invade the province of the trier of fact in her conclusions. She intends to testify about her own determination as to whether the NRA violated certain IRS requirements as she interprets them. Not only is this subject matter beyond Harris's area of expertise, but any conclusion about whether a law has been violated is exclusively reserved for the trier of fact.

RELEVANT LAW

"Admission of expert testimony is left to the sound discretion of the trial court and 'dependent on whether the expert testimony would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror.'" *People v. Nicholson*, 26 N.Y.3d 813, 828 (2016) (citing *People v. Williams*, 20 N.Y.3d 579, 583–84 (2013)). "[A]dmissibility turns on whether, given the nature of the subject, 'the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is attainable.'" *People v. Cronin*, 60 N.Y.2d 430, 432–33 (1983) (citing *Van Wycklyn v. City of Brooklyn*, 118 N.Y. 424, 429 (1890)).

Of course, "[a]bsent an inability or incompetence of jurors to comprehend the issues and evaluate the evidence, the opinions of experts 'which intrude on the province of the jury to draw inferences and conclusions, are both unnecessary and improper.'" *Nevins v. Great Atl. & Pac. Tea*

Co., 164 A.D.2d 807, 807–08 (1st Dept 1990) (citing *Kulak v. Nationwide Mut. Ins. Co.*, 40 N.Y.2d 140, 148 (1976)) (internal citations omitted).

In determining the admissibility of an expert's testimony, factors to be considered include the facts of the case, whether the testimony would assist jurors in reaching a verdict, and the purpose for which the testimony is offered. *People v. Taylor*, 75 N.Y.2d 277, 293–94 (1990). Thus, the trial court must "determine the scope and extent of the testimony to be offered in light of the evidence before the jury." *People v. Brown*, 97 N.Y.2d 500, 506 (2002). Finally, "courts must determine whether 'the potential value of the evidence is outweighed by the possibility of undue prejudice to the defendant or interference with the province of the jury.'" *People v. Rivers*, 18 N.Y.3d 222, 228 (2011) (citing *People v. Bennett*, 79 N.Y.2d 464, 473 (1992)).

ARGUMENT

I. Harris's Testimony Is Not Helpful Or Relevant To The Trier Of Fact.

Expert testimony must be relevant and helpful to the trier of fact. *See People v. Grant*, 241 A.D.2d 340, 341 (1st Dep't 1997) (holding expert testimony "was properly admitted" where "it was relevant and helpful" to the jury). Here, Harris's proffered testimony is ***neither***.

First, Harris's analysis is not relevant to the NRA at present—in 2023—or looking into the future. At best, Harris can opine that, ***several years ago***, the NRA ***self-reported*** private inurement transactions. She cannot make any conclusion as to whether such transactions actually occurred or the nature of such transactions—she lacks the expertise and foundation to do so. And she cannot opine as to the propriety of any such transactions because her data is limited to examining self-filed Form 990s.

Second, although Harris intends to describe the NRA's self-reporting of potential private inurement transactions in 2019 and 2020 as a negative, her analysis is to the contrary. Indeed, this self-reporting is proof of transparency. Harris's analysis includes evidence that the NRA was

actively engaged in investigating and taking action when it uncovered transactions that had not been adequately reported, and the NRA followed applicable guidelines in reporting those transactions properly. This demonstrates that the NRA, as of 2019, had made positive changes to its governance and reporting structure, which entirely undermines the NYAG's requested relief.

Harris's proposed conclusions seek to mislead and distort the NRA's self-reporting by casting it in a negative light when, in fact, the reporting ***complied*** with applicable IRS guidelines and requirements. In sum, Harris's testimony has limited probative value—if any—and, at the same time, its characterization of the NRA is unfairly prejudicial and misleading. Thus, Harris should be precluded from testifying and presenting evidence.

II. Harris's Statistical Analysis Is Entirely Unreliable.

Harris's testimony and conclusions are wholly reliant on her statistical analysis of a universe of data that she gathered. However, that universe of data is incomplete. Whether because of deliberate cherry-picking or simple negligence, the results of Harris's analysis are entirely unreliable. Thus, Harris cannot be allowed to testify. *See Raskin v. Wyatt Co.*, 125 F.3d 55, 67 (2d Cir. 1997) (affirming exclusion of expert report "premised on an elementary statistical error"); *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2014 WL 7882100, at *12 (E.D.N.Y. Oct. 15, 2014), *report and recommendation adopted*, 2015 WL 5093503 (E.D.N.Y. July 10, 2015) (excluding expert testimony "premised on a miscalculation").

A. The Reliability Of An Expert's Opinion Is Paramount To Its Admissibility.

It is well-established that there is a "danger in allowing unreliable or speculative information (or 'junk science') to go before the jury with the weight of an impressively credentialed expert behind it." *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 447 (2006). Therefore, courts have the inherent responsibility "to keep unreliable evidence ('junk science') away from the trier of fact regardless of the qualifications of the expert" (*Clemente v. Blumenberg*, 183 Misc. 2d

923, 932 (Sup. Ct. Richmond Cnty. 1999)) and "to assure that there is an adequate foundation of reliability demonstrated for the testifying expert's opinions" (*People v. Santiago*, 35 Misc. 3d 1239(A), at *3 (Sup. Ct. N.Y. Cnty. 2012)).

The reliability of an expert's opinion is called into question when the expert engages in improper cherry-picking. Cherry-picking occurs when an expert selects materials to rely on that skew the results of the analysis and generate a desired conclusion for the party offering the evidence. *Daniels-Feasel [v.] Forest Pharms., Inc.*, 2021 WL 4037820, at *5 (S.D.N.Y. Sept. 3, 2021). This can render the expert's testimony and conclusions unreliable and inadmissible. *See Kurtz v. Costco Wholesale Corp.*, 818 F. App'x 57, 62 (2d Cir. 2020) ("cherry-picking data to artificially generate a particular result may render a model so unreliable that it is inadmissible"); *United States v. Paracha*, 2006 WL 12768, at *20 (S.D.N.Y. Jan. 3, 2006), *aff'd*, 313 F. App'x 347 (2d Cir. 2008) (recognizing the inherent unreliability of expert testimony that relies on "cherry-pick[ed]" information); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 299 F. Supp. 3d 430, 484 (S.D.N.Y. 2018) (concluding that expert's inclusion of certain material skewed the results and rendered the opinions "unreliable"). As offensive—and unreliable—is proffering an expert whose analysis ignores evidence which contradicts the expert's intended opinion. This is another form of cherry-picking. Ignoring such contradictory evidence can also cause the expert's testimony to be inadmissible and subject to preclusion. *See Selig v. Pfizer, Inc.*, 185 Misc. 2d 600, 607 (Sup. Ct. N.Y. Cnty. 2000), *aff'd*, 290 A.D.2d 319 (1st Dep't 2002) (precluding expert testimony where proffered expert came to his conclusions by, among other things, "ignor[ing] evidence to the contrary"); *Daniels-Feasel*, 2021 WL 4037820, at *5 ("exclusion of proffered testimony is warranted where the expert fails to address evidence that is highly relevant to his or her conclusion").

B. The Data Underlying Harris's Statistical "Conclusions" Is Fatally Flawed Undermining Her Conclusions.

Harris states (incorrectly) that she worked from an initial data set that included "[a]ll available Form 990s" from the "Amazon Web Services (AWS) on-demand cloud computing platform." Report, at 8 §V(A)(2)-(3). From that universe, she claims to have retained data only from organizations organized under IRC §501(c)(3) and §501(c)(4). *Id*. at 8 §V(A)(4). She states that the total population of unique organizations was 285,354 and the population of §501(c)(4) organizations was 12,404. *Id*. at 8 §V(A)(5). Harris uses this universe of organizations to conduct the rest of her analysis and to reach her statistical conclusions. Namely, Harris relies on this universe of organizations to state that "the NRA is one of less than 2% of charitable organizations in the US that electronically filed their IRS Form 990 and reported excess benefit transactions or significant diversions of their assets between 2010-2020." *Id*. at 24 §VI(1). This, Harris concludes, makes the NRA an "outlier." *Id*. at 24 §VI(2)-(3).

Critically, the underlying universe of organizations that Harris relied on for her analysis is flawed—either the result of deliberate selection bias or a failure to ensure complete coverage. Indeed, multiple §501(c)(3) organizations that reported private inurement on Form 990s during the sample time period that Harris purported to analyze are completely left out of Harris's universe. This was made clear during Harris's deposition when she was confronted with the Form 990s from several §501(c)(3) organizations that each reported private inurement in 2018 and/or 2019. *See* Harris Dep. (Ex. B) 107:20-110:4 (Form 990 related to Faizan-E-Aisha, Inc. reporting private inurement); 110:5-112:23 (Form 990 related to Juniper Hills School of Place Based Education reporting private inurement); 113:24-116:13 (Form 990 related to Light Horse Legacy, Inc. reporting private inurement); 116:15-119:8 (Form 990 related to Providence Self-Sufficient Ministries, Inc. reporting private inurement). During her deposition, Harris was provided the

opportunity to search the underlying universe of data that she relied on to determine whether these organizations were included. ***None*** were. *See id*. at 142:12-144:24 (Faizan-E-Aisha, Inc.);148:1-10 (Juniper Hills School of Place Based Education); 148:11-25 (Light Horse Legacy, Inc. and Providence Self-Sufficient Ministries, Inc.). Harris has never explained how or why these organizations were not included in her data universe. However, what is clear is that these organizations and others like them were, in fact, excluded from Harris's analysis.

By excluding organizations that reported private inurement in the relevant timeframe, Harris impermissibly skewed the resultant statistical analysis. She then used that skewed analysis to (improperly) conclude that the NRA was an "outlier" among the universe of organizations. Harris's conclusion that the NRA is "abnormal" relies ***entirely*** on this (skewed) statistical data. *See* Report, at 24 §VI(1) (stating that the NRA is "one of less than 2%" that reported private inurement), 24 §VI(2) (stating that the NRA's reported private inurement would "account for 91%" of reported transactions for large §501(c)(4) organizations), 24 §VI(3) (stating that the NRA was in the 0.007th and 0.003rd percentile of organizations based on its reporting of private inurement). Finally, Harris concludes that her "analysis has demonstrated" that the NRA's "operations violated IRS requirements." *Id*. at 24 §VI(4). But that analysis improperly excluded data contrary to her (and the NYAG's) preformed conclusion. Thus, the conclusion that Harris seeks to espouse to the trier of fact is, among other things, unreliable and contrived.

It is well-established that experts "cannot 'gerrymander' statistical data to skew the results in their favor." *Hogan v. Gen. Elec. Co.*, 109 F. Supp. 2d 99, 102 (N.D.N.Y. 2000). But that is ***exactly*** what happened here. By excluding from her analysis nonprofit organizations that disclosed

private inurement during the relevant timeframe during the relevant timeframe,[2] Harris "utilize[d] 'cherry-picked' data to distort results or produce misleading results." *In re Lyondell Chem. Co.*, 567 B.R. 55, 113 (Bankr. S.D.N.Y. 2017), *aff'd*, 585 B.R. 41 (S.D.N.Y. 2018); *see Barber v. United Airlines, Inc.*, 17 F. App'x 433, 437 (7th Cir. 2001) ("Because in formulating his opinion [an expert] cherry-picked the facts he considered to render an expert opinion, the district court correctly barred his testimony because such a selective use of facts fails to satisfy the scientific method"); *E.E.O.C. v. Freeman*, 778 F.3d 463, 469–70 (4th Cir. 2015) (J. Agee, concurring) ("'Cherry-picking' data is essentially the converse of omitting it: just as omitting data might distort the result by overlooking unfavorable data, cherry-picking data produces a misleadingly favorable result by looking only to 'good' outcomes.").

Harris's opinions are presented as if they are the result of scientifically sound methodology and analysis. The above conclusively demonstrates that ***they are not***. Therefore, this Court cannot have confidence in the reliability of Harris's methods, analysis, and conclusions.[3] As reliability is one of the two foundational requirements for expert testimony to be admissible (the other is helpfulness), Harris ***must be precluded*** from testifying and any related evidence must be ***excluded***.

C. Harris's Conclusions Misrepresent The Data By Failing To Account For False Reporting And Underreporting.

Harris admits that "every study has some limitations." Harris Dep. 87:10-11. Further, she admits that identifying caveats and limitations is a necessary part of any study. *Id.* at 87:1-11. In

[2] Importantly, it is unknown how many §501(c)(3) and §501(c)(4) organizations reporting private inurement during the relevant timeframe used by Harris were excluded from the universe that Harris relied on. The four organizations selected for questioning during Harris's deposition were merely examples to demonstrate the wider problem with Harris's cherry-picked universe.

[3] Additionally, Harris cannot even be effectively rebutted given that she is unable to conclusively establish what the underlying data that she relied on consisted of and why it did not include the examples she was questioned about during her deposition.

fact, Harris's published work illustrates this accepted practice. *See, e.g.*, Harris et al., *The Effect of Nonprofit Governance on Donations: Evidence from the Revised Form 990*, 90(2) Acct. Rev. 579, 607–08 (Mar. 2015) (Report, at App'x. A) (discussing "important caveats" related to the results of the study that serve as limitations); Harris et al., *Why Bad Things Happen to Good Organizations: The Link Between Governance and Asset Diversions in Public Charities*, 146(1) J. Bus. Ethics 149, 163 (Oct. 2015) (Report, at App'x. B) (discussing "important caveats regarding our analysis"). However, Harris fails to disclose any limitations or caveats to her analysis and conclusions in her Report. Indeed, she testified that she "ha[s]n't given ***any thought*** to the limitations of my report." Harris Dep. 88:17-20 (emphasis added). This departure from accepted methods of presenting scientific conclusions underscores how Harris has sought to skew her study and its results to favor the NYAG's theory of the case.

Despite Harris's refusal to acknowledge any, there are obvious limitations on her statistical analysis. One important such imitation is the underreporting—as well as false reporting—of private inurement by numerous organizations. Indeed, "some nonprofit organizations do not report excess benefits properly, whether wittingly or unwittingly." Nadel Rebuttal (Ex. C), at 4. Additionally, some organizations "do not detect such transactions, even when they are occurring," while others are incentivized to not disclose because of "the negative view of self-disclosure." Sullivan & Blacker Rebuttal (Ex. D), at 42–43 ¶¶93-94. Though not included in her Report, Harris admits that "[t]here's no way for me to know" whether an organization was being truthful in its Form 990 filing regarding private inurement reporting. Harris Dep. 55:18-24. However, Harris somehow resisted admitting that this created a limitation to her analysis. *Id*. at 56:6-59:6.

When Harris was confronted with the example of the Wounded Warrior Project at her deposition, she testified that, "I don't know anything" about the Wounded Warrior Project's

termination of executives because it was "outside of the scope of my project." *Id*. at 73:21-74:1. And that she was unaware if the organization was included in the data that she reviewed (and relied on). *Id*. at 74:2-9. Harris was then confronted with the Form 990s filed by the Wounded Warrior Project—a §501(c)(3) organization—for 2014 through 2018. *Id*. at 100:15-107:11. In each of those filings, the organization stated that it had not engaged in any excess benefit transactions with a disqualified person during the current or previous year. *Id*. However, that organization engaged in what was reported as rampant inappropriate spending which ***should*** have been reported on its Form 990s. *See* Nadel Rebuttal, at 4, 6–8; Mehta Rebuttal (Ex. E), at 6–7 ¶13. The Wounded Warrior Project is one of many examples of large, well-known nonprofit organizations that were involved in financial scandals during the timeframe relevant to Harris's analysis. *See* Nadel Rebuttal, at 9–16 (discussing American University, Texas Southern University, several United Way organizations, and Black Lives Matter).

While these scandals drew nationwide attention, Harris took no steps to ensure the accuracy of her underlying data or to denote the clear limitations of her analysis—namely, that it is wholly dependent on the integrity of an organization's self-reporting. This makes the underlying data—the Form 990s themselves—inherently unreliable and inaccurate. A limitation like this ***must*** be disclosed as part of the analysis. *See Durasno v. 680 Fifth Ave. Assocs., L.P.*, 164 N.Y.S.3d 594, 595 (1st Dep't 2022) (discrediting expert affidavit for failing to include a margin of error); *Opal Fin. Grp., Inc. v. Opalesque, Ltd.*, 634 F. App'x 26, 29 n.4 (2d Cir. 2015) (agreeing with the lower court's decision to "accord little to no weight" to expert evidence because of the size of the margin of error in the analysis). Failure to do so is misleading as it gives the trier of fact the impression that the data—and Harris's resultant statistical interpretations—are reliable and helpful.

Allowing Harris's opinions to be presented to the trier of fact in this fashion is unfairly prejudicial, misleading, and confusing. Because Harris cannot demonstrate that her data selection methodology was reliable and accounted for underreporting and false reporting, she should not be allowed to testify about her analysis or her resultant conclusions.

D. Harris's Statistical "Conclusions" Are Misleading.

In her Report, Harris divides the underlying data into three groups of organizations that she claims are "comparable to the NRA." Report, at 8 §V(A)(5). However, this claim is belied by the distinctions drawn among the groups. The first group contains both §501(c)(3) and §501(c)(4) organizations and has no regard for any of the characteristics of the organizations included. There are 285,354 organizations in this group. The second group includes only §501(c)(4) organizations but has no other characteristic filters. This group contains 12,404 organizations. The third group includes 138 "large" §501(c)(4) organizations.[4] Harris defines "large" as an organization having over $100 million in assets. However, this is a measurement that Harris created entirely on her own, and she gives no reason for why she chose to divide the data in this manner.

Including over 285,000 nonprofits in her analysis—the vast majority of which are obviously dissimilar from the NRA—enabled Harris to achieve the desired result of showing the NRA as an outlier. Indeed, there are 272,950 §501(c)(3) organizations in the first group which are not even the same "type" of nonprofit as the NRA. Further, the third group of organizations—the group Harris claims is most similar to the NRA—even when taken as a whole, represent a

[4] Underscoring the unreliability of Harris's data selection and methodology is her inconsistency in discussing the number of unique nonprofits in the third group. Indeed, Harris alternates between stating that there are 109 and 138 unique organizations in the third group. *Compare* Report, at §V(A)(5) *with* Report, at Table 1, Table 4, Table 6, Table 7. This inconsistency is hardly immaterial and creates serious doubt as to the accuracy of Harris's other calculations and representations in her Report.

miniscule percentage of group one (0.048%). Thus, Harris's "findings" related to the NRA are improperly amplified when placed in the wider context of these dissimilar organizations in group one.

The second group—containing §501(c)(4) organizations that electronically filed Form 990s—numbers over 12,000 unique organizations. The organizations in this group have, as Harris admits, total assets as low as $500,000. *See* Report, at 8 §V(A)(1) (stating that organizations with total assets over $500,000 are required to file Form 990s).[5] The NRA has total assets of approximately $200 million—over 400 times larger than organizations potentially included in this group. It is hard to see how such disparate organizations could be said to be similar or "comparable." Besides being §501(c)(4) organizations, there are no other demonstrated similarities for the organizations in this group. And, by retaining organizations in the group that are up to 400 times smaller than the NRA, Harris again propped up the size of group two such that any statistical analysis will be inflated. Indeed, the "large" organizations that Harris claims are most similar to the NRA represent just over 1% of the organizations in group two. Thus, once again, Harris's methodology is deliberately constructed to make the NRA ***appear*** like an outlier.

The third group, which Harris suggests are most like the NRA because they are "large" §501(c)(4) organizations, fails to present substantially similar organizations to the NRA. The ***only*** two similarities between the 138 organizations in this group are that they are §501(c)(4)

[5] Though Harris goes on to state that only organizations with over $10 million in total assets are ***required*** to file their Form 990s electronically, there is nothing stopping an organization with less than $10 million in total assets from filing electronically. Thus, it is a reasonable inference—one that Harris fails to address—that within the group of organizations that electronically filed Form 990s, some had less than $10 million in total assets.

organizations and have over $100 million in total assets—a number Harris decided to use without explanation. Report, at 8 §V(A)(5).

Harris's goal in using these divisions seems to be to make the NRA appear to be an outlier and anomaly. This skewed characterization is unfairly prejudicial and has a high likelihood of misleading the jury. Harris should not be allowed to make statistical comparisons between dissimilar organizations and present that information to the jury as if it were meaningful. She also should not be allowed to utilize inflated statistics to bolster her conclusions and make the NRA ***appear*** to be an extreme outlier for allegedly engaging in certain conduct. *See Raskin v. Wyatt Co.*, 125 F.3d 55, 67 (2d Cir. 1997) (expert's method that "artificially inflated" statistic in comparison group rendered the group unrepresentative and the report "scarcely 'helpful' to a jury").

E. Harris Deliberately Ignores Many Excess Benefit Transactions That Were Reimbursed.

Harris's Report highlights the number of alleged excess benefit transactions reported by the NRA in 2019 and 2020 as compared to other purportedly comparable organizations. Harris painstakingly lists each alleged excess benefit transaction reported by the NRA on its Form 990 for 2019 and 2020. Report, at 11 (Table 2), 14 (Table 3). Harris uses tables to compare the NRA's number of reported excess benefit transactions to other organizations. *Id*. at 17–20 (Tables 4-6), 23 (Table 7). The purpose appears to be to support Harris's conclusion that the NRA is an "outlier" and "abnormal" among other similar organizations. *Id*. at 24 §VI(1)-(4).

However, Harris fails to define the column marked "Status Reported," and fails to define the terms she chose to include in that column. Harris uses the terms "Uncorrected," "Corrected," "Disputed," "Under Review," "Under Investigation," and "Alleged by NY OAG," but does not explain what they mean. *Id*. at 11 (Table 2), 14 (Table 3). Nor does Harris indicate the actual status of the alleged excess benefit transactions at issue. For example, the transaction related to Joshua

Powell in Table 2 is labeled as "Disputed & Uncorrected." *Id*. at 11 (Table 2). There is no indication in Harris's Report what that term means. However, in the Form 990, it is explained that the NRA demanded payment from Powell of the excess benefit amount as early as March 2020, but Powell refused to repay the entire amount. *Id*. at 12–13. Harris does not differentiate these transactions—where the NRA has taken corrective action—from the others. Likewise, the transactions noted by Harris to be "Under Investigation" were being investigated by the NRA—not some governmental body—to determine whether repayment would be necessary. Again, Harris treats these transactions the same as all the others. And, most glaringly, the transactions noted as "Corrected" were actually ***repaid***, in full, by the disqualified person to the NRA in accordance with IRS guidelines.

Nonetheless, Harris includes the above-referenced transactions in her statistical analysis as illustrations of the NRA's purported impropriety. By doing so, and by failing to recognize the repayment of identified excess benefit transactions, Harris improperly inflates the number of excess benefit transactions in which the NRA was involved. Nadel Rebuttal, at 3. This is another example of Harris deliberately skewing the data and methodology to accomplish a desired conclusion. And it is another reason this Court should preclude Harris from testifying and exclude all evidence related to her analysis.

III. Harris's Conclusion That The NRA's Operations Violated IRS Requirements Is Unsupported By Her Analysis And Misleading.

A. Harris Cannot Opine On Whether The NRA Actually Violated Any IRS Requirement.

Harris's conclusion that the NRA "violated IRS requirements for tax exempt organizations" is improper. Report, at 7 §IV(4). Harris's analysis does not support such a conclusion. Rather, Harris's analysis can result ***only*** in the conclusion that an organization ***reported***

that private inurement potentially occurred. Whether the underlying private inurement actually occurred is not part of the data that Harris collected and analyzed. As Harris testified: "I don't have any way to know of the actual occurrence I just have the form 990 data which provides disclosures of excess benefit transactions." Harris Dep. 75:19-22. And, as is discussed above, there are ample examples within the data that Harris analyzed where an organization engaged in private inurement but deliberately or negligently failed to report it. Moreover, Harris has no data related to the correlation between the actual occurrence of private inurement and the reporting of private inurement that might make her conclusion about whether a violation of IRS requirements occurred an acceptable scientific conclusion.

The ***only*** permissible conclusion that Harris can offer is that the NRA ***reported*** occasions of private inurement and the number of reports that the NRA made. She cannot testify whether any such occasions occurred or the nature of any occurrence. Because, as she admits, she ***only*** knows what is included on the NRA's Form 990s and, thus, lacks foundation to testify as to what occurred. Therefore, this Court should preclude Harris from testifying to any conclusion as to whether the NRA actually engaged in private inurement and violated any IRS requirement. And any references to these conclusions in Harris's Report or deposition should be excluded from evidence.

B. Harris's Suggestion That The NRA Violated IRS Requirements By Filing Form 990s Disclosing Private Inurement Is Wrong.

According to Harris, the Form 990 "provides the IRS and the public with information about an organization's exempt and other activities, finances, governance, compliance with tax filings, as well as certain compensation information." Report, at 6 §III(6). Self-reporting on a Form 990 is an indicator of organizational ***transparency***—an important ***positive*** characteristic for nonprofit organizations. *See* Sullivan & Blacker Rebuttal, at 40 ¶91. Under the guidance for completing a Form 990, when an organization becomes aware of a potential private inurement transaction, it

must report it. Form 990 (Ex. F), at Part IV, 25a–25b; Part VI, §A(5). And the Form 990 "contemplates that Excess Benefit Transactions may not be identified in the year that they occurred, but once identified should be disclosed in that year's return." Mehta Rebuttal, at 4 ¶7; *see* Form 990, Part IV, 25b ("Is the organization aware that it engaged in an excess benefit transaction with a disqualified person in a prior year, and that the transaction has not been reported on any of the organization's prior Forms 990 or 990-EZ?").

If an organization reports a private inurement transaction, the organization is then responsible for following the applicable IRS requirements related to such a transaction. *See id*. at Part IV, 25a ("*If 'Yes,' complete Schedule L, Part I*"), 25b ("*If 'Yes,' complete Schedule L, Part I*"); Part VI ("*For each 'Yes' response to lines 2 through 7b below, and for a 'No' response to line 8a, 8b, or 10b below, describe the circumstances, processes, or changes on Schedule O*."); *see also* Mehta Rebuttal, at 4–5 ¶¶8-9. This includes potentially seeking to correct the transaction. *See* IRS Instructions for Form 990 Return of Organization Exempt From Income Tax (Ex. G), at 13 ("TIP: … A section 501(c)(3), 501(c)(4), or 501(c)(29) organization that becomes aware that it may have engaged in an excess benefit transaction should obtain competent advice regarding section 4958, pursue correction of any excess benefit, and take other appropriate steps to protect its interests with regard to such transaction and the potential impact it could have on the organization's continued exempt status.").

Taken together, an organization's self-reporting of potential private inurement on a Form 990 is ***not*** an admission of a violation of IRS requirements. If it were, the regulatory scheme would be worthless as there would be no impetus for organizations to follow it. Rather, as is stated above, Form 990s are a transparency mechanism. Organizations that are transparent in disclosing potential

private inurement and properly seek correction—as the NRA has done—are ***not*** in violation of the IRS requirements. *See* Mehta Rebuttal, at 4–5 ¶¶7-9

The purported purpose of Harris's analysis is to compare the NRA's reporting of private inurement to that of other nonprofit organizations. Harris, however, intends to use the NRA's transparency and compliance with IRS guidelines as a basis to opine that the NRA's operations were in violation of the law. This conclusion—and Harris's testimony—confuses the issues and, most importantly, is misleading and disingenuous. Therefore, it should not be allowed.

IV. Harris's Conclusion That The NRA's Operations Violated IRS Requirements Is An Impermissible Inference And Improper Legal Conclusion.

Although expert testimony may embrace the ultimate issue (*Kravitz v. Long Island Jewish-Hillside Med. Ctr.*, 113 A.D.2d 577, 580 (2d Dep't 1985)), an expert may not "usurp[] the function of the jury" (*Nevins*, 164 A.D.2d at 808). Further, an expert may not testify to legal conclusions (*Measom v. Greenwich & Perry St. Hous. Corp.*, 268 A.D.2d 156, 159 (1st Dep't 2000)) or to "what any law requires or whether it applies to the evidence adduced" (*Flores v. Infrastructure Repair Serv., LLC,* 52 Misc. 3d 664, 667 (Sup. Ct. N.Y. Cnty. 2015)). And, importantly, "[w]hile an expert may testify regarding acts, omissions, or conditions that would constitute a violation of a state or federal regulation, other law, or duty of care or regarding other facts bearing on the issue, an expert ***may not***, over objection, ***draw the ultimate conclusion that the evidence adduced does or does not amount to a violation***." *Id*. (emphasis added). "Absent an inability or incompetence of jurors to comprehend the issues and evaluate the evidence, the opinions of experts 'which intrude on the province of the jury to draw inferences and conclusions, are both unnecessary and improper.'" *Nevins*, 164 A.D.2d at 807–08 (citing *Kulak*, 40 N.Y.2d at 148).

A. Harris's Inference That The NRA's Operations Violated IRS Requirements Invades The Province Of The Trier Of Fact.

Harris is offered as an expert in "nonprofit accounting." Harris Dep. 158:1-13. She is not an expert on the IRC or IRS enforcement against nonprofit organizations. Nor does her background and experience indicate that she has any specialized knowledge or training in either subject. Harris's analysis focuses ***only*** on the ***reporting*** of private inurement by nonprofit organizations for the period of 2010 through 2020. Report, at 8 §V(A)(5). Harris admits that she has no way of knowing whether private inurement took place. Harris Dep. 75:19-22. And, therefore, Harris has no way of knowing whether any organization violated any IRS provision or requirement.

Nonetheless, based solely on the fact that "the NRA has reported numerous [private inurement] transactions," Harris concludes that the NRA's "operations violated IRS requirements prohibiting private inurement." Report, at 24 §VI(4). This is an inference that goes beyond Harris's area of expertise—she is not qualified to adjudge an IRC violation. Moreover, Harris's inference is well within the province of the trier of fact. There is no indication that the factfinder cannot, on its own, determine whether the purported transactions included in the NRA's Form 990s—if they actually occurred—ran afoul of the IRS's requirements. Because this does not require the testimony of an expert, Harris should not be allowed to overstep into the realm of the trier of fact by drawing inferences and conclusions that are within a juror's competence. *See Kulak*, 40 N.Y.2d at 148 ("Absent such inability or incompetence, the opinions of experts, which intrude on the province of the jury to draw inferences and conclusions, are both unnecessary and improper"). Therefore, Harris's conclusion should be excluded.

B. Harris's Testimony About Whether The NRA Violated IRS Requirements Is An Impermissible Legal Conclusion.

It is well-established that an expert cannot testify that a certain act constituted a violation of law. *Flores*, 52 Misc. 3d at 667. However, Harris does exactly this in her Report. Harris (improperly) concludes that, "The NRA ***has violated*** IRS requirements for tax exempt organizations insofar as it has reported that private inurement took place in the organization." Report, at 7 §IV(4) (emphasis added).

As an initial matter, Harris's study did not include any data from which she could conclude that a transaction occurred—let alone any such transaction amounted to a violation of law. Next, as discussed, Harris's inference of a violation is outside her purported expertise and is within the ken of the trier of fact. But, further, Harris is asserting ***her own*** legal conclusion to the trier of fact based on ***her own*** interpretation and opinion of the IRS requirements. This is entirely improper. As the New York County Supreme Court stated clearly in *Flores*:

> If an expert witness offers an ultimate conclusion whether a violation has occurred, that opinion necessarily depends on the witness' opinion of the law's requirements and applicability, which are legal conclusions that the court must delineate.
>
> Thus, whether a violation has occurred is a legal conclusion either for the court to draw based on the undisputed relevant evidence or for the fact finder at trial to draw after determining the facts from conflicting relevant evidence and applying the law according to the court's instructions. The parties' attorneys of course may advocate what various laws require, whether they apply to the evidence, and that it does or does not establish a violation of those laws, but the court grants defendant's motion to the extent of precluding [the expert witness] from giving opinions on those questions.

Flores, 52 Misc. 3d at 667 (internal citations omitted). Therefore, this Court should not allow Harris to offer the conclusions that she intends to offer related to whether the NRA's reporting of

private inurement amounted to a violation of IRS requirements. *See* Report, at 7 §IV(4), 24 §VI(4); Harris Dep. 77:20-78:3. This testimony is improper and inadmissible.

CONCLUSION

For the foregoing reasons, Defendant NRA respectfully requests this Honorable Court exclude all evidence and testimony intended to be offered by the NYAG through Erica Harris and preclude Harris from testifying as part of the NYAG's case.

Respectfully submitted,

Dated: March 10, 2023
New York, New York

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CERTIFICATION OF COMPLIANCE

I hereby certify pursuant to Rule 17 of the Rules of Practice for the Commercial Division of the Supreme Court of the State of New York that the total number of words in the foregoing document, exclusive of the caption, table of contents, table of authorities and signature block, is 6,156 according to the "Word Count" function of Microsoft Word, the word-processing system used to prepare the document, and thus that the document complies with the word count limit set forth in Rule 17.

Dated: March 10, 2023
New York, NY

/s/ Christopher T. Zona
Christopher T. Zona

CERTIFICATE OF SERVICE

I, Christopher T. Zona, hereby certify that, on March 10, 2023, a true and correct copy of the foregoing document was electronically transmitted and served upon all counsel of record via this Court's electronic case filing system.

Dated: March 10, 2023
New York, NY

/s/ Christopher T. Zona
Christopher T. Zona