SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK, **Plaintiff,** **v.** **THE NATIONAL RIFLE ASSOCIATION OF AMERICA, WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,** **Defendants.**	**Index No. 451625/2020** **Motion Sequence No. 44** **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA IN OPPOSITION TO THE NYAG'S MOTION TO DISMISS CERTAIN OF THE NRA'S DEFENSES

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I.
PRELIMINARY STATEMENT

The NYAG attacks thirteen NRA's defenses on the ground that they fail as a matter of law and will present an unnecessary "distraction" at trial. NYSCEF 1178. To the contrary, these defenses assert important rights which were not extinguished by the inapposite prior rulings and do not disappear merely because the government is a litigant. Moreover, the contested defenses draw on facts and themes which will permeate the record at trial irrespective of how the Court rules on this Motion. Therefore, far from carving off a mere "distraction," granting the Motion would force the NRA to litigate critical issues with one hand tied behind its back. The Court should deny it instead.

First, the NYAG attacks some defenses as inapplicable on the ground that she is acting in the public interest or enforcing a public right. But the NYAG cites no authority for the premise that the government's "public interest" impetus must be presumed as a matter of law where, as here, the government's motives are contested as a matter of fact. Indeed, the NRA alleges that far from acting in the public interest, the NYAG sought to dissolve (and seeks other disproportionate remedies[1] designed to chill and impede) its operations out of political animus, for political gain. After insisting that the Court foreclose discovery concerning the NRA's allegations about her motives, the NYAG may not demand a ruling that deems those allegations false as a matter of fact.

[1] References to exhibits are to the documents annexed to the Affirmation of Svetlana Eisenberg, dated March 13, 2023.

Similarly, the NYAG may not rely on "law of the case" to foreclose defenses. That doctrine, which is "more flexible"[2] than claim/issue preclusion to begin with, embraces "issues . . . that have . . . been determined." *Ahmed v. Carrington*, 138 N.Y.S.3d 86, 88 (2d Dep't 2020). It does not apply to questions which were neither fully and fairly litigated, nor actually decided. The Court's decision on June 10, 2022, only ruled on the NYAG's motives' nexus to the initiation of the investigation in 2019, did not resolve factual issues raised by the NRA's defenses—namely, whether the commencement and conduct of this particular lawsuit, and the choice of relief sought, serve the public interest (as the NYAG contends) or constitute unconstitutional retaliation (as the NRA contends). The jury should decide which contention is true.

Finally, the NYAG says the NRA must allege additional elements to support unclean hands defense. But the NYAG cites no binding or apposite precedent for this request. Thus, the Court should deny the Motion in its entirety.

II.
BACKGROUND

A. The causal link between the NYAG's political animus and her political prosecution of the NRA is well-pleaded.

The NYAG did not formally commence her investigation of the NRA until April 2019, after a New Yorker article alleged compliance lapses at the Association.[3] But there is ample evidence that the government's underlying animus, not the April 2019 article, caused James's investigation and this resulting lawsuit. The article appeared just before the 2020 election cycle

[2] *People v. Evans*, 94 N.Y.2d 499, 504 (2000); *see also In re LaDelfa*, 107 A.D.3d 1562, 1563–64 (4th Dept. 2013) ("the doctrine of . . . law of the case is not one of inflexible law").

[3] Exhibit 26.

and was written in partnership with an anti-NRA NGO that boasts of colluding with New York State to prompt investigations of the NRA, and worked directly with the NYAG's office here. And by the time it was published, the writing was on the wall. One of James's predecessors warned—and James, on the campaign trail, vowed—that New York would wield all of its regulatory-enforcement powers to suppress the NRA and punish the NRA's "banks" and "investors."

1. One of James's predecessors, Eric Schneiderman, warned the NRA that the State would wield its enforcement power as a political cudgel.

In 2017, Eric Schneiderman, the former Attorney General, warned NRA Director Tom King that "powerful people" were pressuring the NYAG's office to investigate the NRA and that the NRA should hire New York-based counsel and "prepare for the worst."[4] Importantly, the whistleblower complaints and media accounts referenced in the NYAG's briefs had not surfaced yet. Therefore, even Schneiderman did not seem to know what the NYAG might investigate the NRA for—only that "powerful people" wanted an investigation to occur.[5] The NRA had no choice but to look into "all aspects" of its potential exposure.[6]

2. Before taking office, and long before any media accounts of alleged improprieties at the Association, James singled out the NRA for its speech and pledged a fishing expedition into NRA if elected.

At a rally on July 12, 2018, James pledged to "use ***the constitutional power as an Attorney General*** to regulate charities . . . to investigate [the NRA's] ***legitimacy***."[7] She explained: "The

[4] Exhibit 41.

[5] *Id.*

[6] *Id.*

[7] Exhibit 5.

NRA has an office here in New York State and what we want to do is ***investigate*** to see ***whether or not*** they [the NRA] have in fact complied with the not-for-profit law . . . ."[8] A press release on her web site also announced that as Attorney General, James would "***[u]se the powers of the [Attorney General's] office to investigate the legitimacy*** of the NRA as a charitable institution."[9] The press release also stated:

> The NRA is an organ of deadly propaganda ***masquerading as a charity for public good***. Its agenda is set by gun-makers . . . .[10]

Thus, in sharp contrast to the cases the Motion cites,[11] NYAG's own statements identify the NRA's protected speech ("deadly propaganda") as the impetus for James's vow to "see whether

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[8] *Id.*

[9] Exhibit 3.

[10] *Id.* Around this time, on her website, James posted "Taking on the Scourge of Gun Violence and Keeping New Yorkers Safe." echoing her statements at the rally and in the press release. She stated, in part, "The NRA is an organ of deadly propaganda ***masquerading as a charity for public good***. Its agenda is set by gun-makers . . . . As Attorney General, Tish James has the ***constitutional power to regulate charities***, and ***she will use*** those powers to investigate the ***legitimacy*** of the charities under her jurisdiction, including the NRA." (emphasis added).

[11] *Compare People v. Trump*, 62 Misc. 3d 500, 508-09 (Sup. Ct. N.Y. Cty. 2018) (case cited by the NYAG where there were no similar allegations); *People v. The Trump Org., Inc.*, No. 451685/2020, 2022 WL 489625, at *4 (Sup. Ct. N.Y. Cty. Feb. 17, 2022), *aff'd*, 205 A.D.3d 625 (1st Dep't), *appeal dismissed*, 38 N.Y.3d 1053 (2022) (same). In *People v. Trump*, Justice Scarpulla stated "[i]t is not within the province of the courts to subjectively determine the motivation of a government agency in commencing an enforcement proceeding, or to dismiss the proceeding because of the political disagreements of the parties." *Trump*, 62 Misc. 3d at 509. Here, the NRA is not basing its defenses on political disagreements, rather James's pledge to destroy the NRA because of her political disagreement. In *People v. The Trump Org., Inc.*, Justice Engoron stated: "Indeed, the impetus for the investigation was not personal animus . . . not campaign promises, but . . . sworn congressional testimony by former Trump associate Michael Cohen that respondents were "cooking the books." *Trump Org., Inc.*, 2022 WL 489625, at *5. Here, the NYAG cannot point to any evidence—let alone sworn statements—as the impetus for her 2018 statements.

or not" the NRA is complying with applicable law. And she makes abundantly clear that she will use the constitutional power of her office to destroy a disfavored speaker not because she wishes to carry out her statutory responsibilities to protect NRA donors or beneficiaries, but, rather, because she opposes the NRA's mission. Incredibly, far from protecting NRA donors, James vowed to punish them.[12] What is more, James conveys without any hesitation that her "constitutional power to regulate charities," which she tells voters she "will use," includes the power to police speech. Each of these themes will be repeated and amplified numerous times in subsequent statements.

The Court stated that "[Attorney General's] campaign-trail rhetoric" constitutes "evidence of personal animus,"[13] but deemed it "relevant" for purposes of its dismissal of the NRA's constitutional counterclaims "only if the NRA alleges a sufficient causal link between the animus and the adverse action [referring to commencement of the investigation]."[14] Because the Court concluded that the NRA had not alleged a sufficient causal link, it deemed the evidence of personal animus irrelevant.[15]

The NYAG claims that, because of the Court's prior ruling, "campaign-trail rhetoric" is irrelevant here. NYSCEF 1178. The NYAG is wrong for five separate reasons. ***First***, as discussed below, the NRA's additional allegations here provide irrefutable support of sufficient nexus

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[12] Exhibit 12 ("So, we need to again take on the NRA, which holds itself out as a charitable organization. But, in fact, they are not. They are nothing more than a criminal enterprise. ***We are waiting to take on*** all of the banks that finance them, ***their investors***.") (emphasis added).

[13] NYSCEF 706 page 7 n.6.

[14] *Id.*

[15] *Id.*

regardless of the applicable standard.[16] ***Second***, as discussed below, in deeming the evidence of animus irrelevant, as far as the opinion reflects, the Court only considered the causal link to the investigation (not to the filing of the dissolution lawsuit or decisions to seek other draconian remedies against the NRA).[17] ***Third***, because this is a civil action, the strength of the required nexus is "substantial cause."[18] ***Fourth***, regardless of the nexus's required strength, its sufficiency must be submitted to the jury. ***Finally***, the NRA believes that in striking the counterclaims, the Court did not appreciate the relevant timeline.[19]

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[16] Notably, the "law of the case" doctrine expressly accommodates an inconsistent later ruling—even on an identical, previously-decided issue—if a "more fully developed record" urges a different result. *Mazur Bros. Realty, LLC v. State*, 117 A.D.3d 949, 952 (2d Dept 2014).

[17] NYSCEF 706 pages 8-12.

[18] *See* Section IV.A.1 below.

[19] Unlike, in *Exxon Mobil Corp. v Schneiderman,* 316 F Supp 3d 679, 710 [SD NY 2018], affd in part, appeal dismissed in part sub nom. Exxon Mobil Corp. v Healey, 28 F4th 383 [2d Cir 2022]). (cited in NYSCEF 706), when James called the a "terrorist organization" and a "criminal enterprise," questioned its legitimacy as a charitable organization, and pledged to investigate "whether or not" it complied with the law, ***there were no press or other accounts*** alleging improprieties at the NRA. In *Exxon*, the court highlighted that Exxon did not allege that at the commencement of the investigation the officials disbelieved reports of potential improprieties. Here, in contrast, there were no reports to believe or disbelieve. James accused the NRA of violating the law and pledged to go after it with ***no basis***.

3. There are triable issues not only regarding James's motive for investigating the NRA, but the motives animating this litigation and her decision to seek specific remedies.

This case is further distinguished from other precedents on which the NYAG relies because James has expressed her animus so voluminously[20] and continuously—including ***during*** this lawsuit, in statements ***about*** this lawsuit—that the absence of any "causal link" between the NYAG's animus and her actions cannot reasonably be found at summary judgment on an incomplete record, and must instead be decided by the jury.[21]

Furthermore, James's multiple statements once the lawsuit was filed similarly evidence that James's motivation for the lawsuit was to dissolve the NRA.[22] She almost invariably referred to the lawsuit as the "lawsuit to dissolve the NRA." She also grossly overstated the extent of the Complaint's allegations. For instance, she accused every member of the NRA's 76-member Board of having violated the law.[23]

Further evidence of James's improper intent ironically comes from her post-complaint efforts to rationalize her prior statements. On August 10, 2020, after the NRA sued her for violating its constitutional rights, appearing on a podcast, James stated: "We've got a responsibility and a duty to make sure that individuals comply with the law -- and particularly not-for-profits that

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[20] NRA Rule 19 Statement ¶¶ 2, 8; *compare Exxon Mobil Corp.*, 316 F. Supp. 3d 679, 686 (SDNY 2018) ("The factual allegations against the AGs boil down to statements made at a single press conference and a collection of meetings with climate-change activists"), *aff'd in part, appeal dismissed in part sub nom. Exxon Mobil Corp. v Healey*, 28 F4th 383 (2d Cir 2022).

[21] NRA Rule 19 Statement ¶¶ 12-70.

[22] NRA Rule 19 Statement ¶¶ 28-39.

[23] *Id.* ¶40.

are incorporated in the state of New York. It has nothing to do with the Second Amendment and nothing to do with my personal opinions or views on gun violence. But all to do with compliance with the law and ensuring that individuals adhere to rules and regulations."[24] The jury should assess James's credibility and compare this to her original statements pledging to take down, take on, and go toe-to-toe with the NRA.

On October 19, 2020, a profile piece on James said that "some detractors [claim] she harbors a vendetta against a group she described . . . as a 'terrorist' organization." According to to the piece, James dismisses accusations, explaining "The alleged illegality came to our attention ***as a result of public accounts***. We initiated a nine-month investigation, and ***then*** I decided we had a responsibility to ensure that the mission of the NRA was being carried out." Importantly, the public accounts to which James can possibly be referring did not appear until April 2019, well after the NYAG pledged to take down the NRA.[25]

Numerous additional anti-NRA statements by James are listed in the NRA's Rule 19 statement.[26]

B. Because the NYAG insisted during discovery that her motivations were irrelevant—denying the NRA documents and testimony that would prove they were improper—the NYAG cannot now demand a summary finding that she is acting in the public interest.

The NRA attempted to obtain discovery from the NYAG and non-party Everytown related to the NYAG's motivations for this action and her dissolution and other claims. The NYAG argued that such evidence is irrelevant. For instance, on July 27, 2022, the NYAG represented to the

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[24] *Id.* ¶40.

[25] *Id.* ¶40; Exhibit 40.

[26] NRA Rule 19 Statement ¶¶12-70.

Court that matters related to her animus are "irrelevant."[27] Thus, she cannot now demand a summary finding that she is acting in the public interest.

C. The NYAG mischaracterizes the Court's prior rulings.

The NYAG mischaracterizes prior rulings of this Court. She claims that in dismissing the NRA's counterclaims the Court concluded that the NRA did not plausibly state that the NYAG's animus was the but for cause for bringing this case. On June 10, 2022, the Court indeed dismissed the Counterclaims but it did so in large part on venue, immunity, and mootness grounds. Thus, the Court did not reach whether the NYAG's animus was the but for cause of the NYAG's decision to commence this legal action or of her decision to seek certain relief. The NYAG also mischaracterizes the Court's prior ruling dated September 29, 2022, as discussed in Section IV.C below.

III.
LEGAL STANDARD

The NYAG moves to dismiss thirteen defenses under CPLR 3211(b), and seeks summary judgment as to them under CPLR 3212(b).

The movant must show "a defense is not stated or has no merit." CPLR 3211(b); Hon. Mark C. Dillon, McKinney's Practice Commentaries ("Dillon") CPLR 3211, C3211:34. The Court must "[a]ccept the facts alleged in the [NRA's Answer] as true," "liberally construe the

[27] NYSCEF 804 page 7; *see also* Exhibit 55 at 5-13, 17-19 (NYAG objecting to NRA's numerous requests for production of records related to NYAG's animus' nexus to this action on the ground that the requests called for information that is material and necessary to the "defense of this action").

pleadings in [the NRA's] favor," and "afford [the Association] the benefit of every reasonable inference." John R. Higgitt C3211:35.

The Court "may generally consider[]" "any . . . proof having an evidentiary impact in the particular situation." Siegel, N.Y. Prac. § 257 (6th ed.). In opposing the NYAG's motion, the NRA "may . . . submit" "evidence to establish the validity of a . . . defense . . . in or with [its] opposing papers." Siegel, N.Y. Prac. § 257 (6th ed.).

Sometimes, "facts [for] opposition ***may*** exist but ***cannot*** [yet] be stated."[28] The Court then order a continuance to permit disclosure. CPLR 3211(d). Although the NYAG could move to dismiss the NRA's defenses before filing the Note of Issue,[29] she first filed the note and then, while making factual arguments necessitating discovery, moved to dismiss certain of the NRA's defenses.

At times, "the affidavit will not be available because [some] needed facts are in the knowledge of [the movant]." Siegel, C3211:46. Then, "the court has explicit power . . . to . . . continue the motion so as to afford the [defendant] an opportunity to seek . . . disclosure." Siegel C3211:46 (nature of a defense may require the opponent to depend entirely on cross-examination of the movant at trial).[30]

A summary judgment motion "shall be denied if any party . . . show[s] facts sufficient to require a trial of any issue of fact." CPLR 3212(b). The NYAG was required by CPLR 3212(b)

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[28] CPLR 3211(d) (opponent must make showing through affidavits).

[29] The NRA asserted the defenses as early as March 23, 2022. NYSCEF 622.

[30] Thus, though the Motion faults the NRA for insufficient "supporting facts" regarding its defenses (NYSCEF No. 1178 at 3) (the Motion is wrong), the NRA respectfully stands ready to supplement its pleadings, or conduct additional discovery, if the Court deems appropriate.

to "support[her motion] by affidavit . . . and by other available proof." Id. Any such "affidavit [must] be by a person having knowledge of the facts." *Id.* It is the NYAG who has the burden to "show that . . . the . . . defense has no merit." *Id.*

CPLR 3212(f) also states that, "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit . . . disclosure."

IV.
ARGUMENT

A. The NRA's constitutional defenses are well pleaded.

1. The NRA's First Amendment Defense

The NYAG seeks to bar the jury from considering whether, as the NRA alleges, the remedies she seeks, such as of a state-appointed "compliance monitor," would infringe the NRA's speech and association rights (the NRA's "First Amendment Defense").[31] The NYAG does not deny her political animus, nor that the Constitution ought to protect the NRA from improper government action. However, the Motion argues that the defense is "not supported by any [] factual allegations"[32] and is "barred by the law of the case."[33] Each argument fails.

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[31] Amended Answer to the Second Amended Complaint, dated November 2, 2022 (NYSEF 889 page 162, filed on November 2, 2022) ("Answer"); *see also* Affidavit of Derek Robinson, NRA's Managing Director of Membership, dated March 13, 2023 (Exhibit 53) (setting forth bases for belief that "if [the] court were to appoint an independent compliance monitor . . . , such an appointment would have deleterious effects on the NRA's ability to obtain and retain members and raise contributions"); *see also* Affidavits of Peyton Knight and John Commerford (Exhibits 51-52).

[32] NYSCEF 1178 pages 6-7.

[33] NYSCEF 1178 pages 15-17.

First, the NRA was denied discovery which would further substantiate its constitutional defenses. Yet, the record is replete with evidence of unconstitutional animus and its requisite "causal link." The Answer, among other things, recites the NYAG's campaign trail threats to take down the NRA,[34] quotes the NYAG's accusations that the NRA is a "terrorist organization" and nothing more than a "criminal enterprise."[35] These accusations were levied before James saw a shred of evidence[36] and have not appeared in her Complaint.[37] And she admits that she authorized the investigation after an extensive meeting with Everytown, a gun-control organization established to undermine the NRA and cites James's statement in the Fall of 2021 that the citizens of New York should vote for her—this time for Governor—in part because she worked to "eliminate the NRA."[38] Thus, the defense is far from conclusory.[39]

Second, the dismissal of counterclaims does not "***require[]*** dismissal of the . . . retaliation . . . defense[]."[40] Rather, for procedural reasons, the Court's dismissal did not determine whether the NYAG's commencement or conduct of this action, or the remedies sought herein, could be

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[34] Answer ¶ 625.

[35] Answer page 156.

[36] Answer page 1.

[37] *E.g.*, NYSCEF 11 (containing no allegations that the NRA is a criminal enterprise or a terrorist organization); NYSCEF 646 (same).

[38] Answer page 2.

[39] NYSCEF 1178 pages 6-7.

[40] *Id*. page 10.

linked to the political animus James undisputedly evinced. Instead, the ruling was premised on absolute immunity,[41] venue considerations,[42] and a narrow consideration of the investigation.

The "law of the case doctrine precludes" "relitigati[on of] an issue decided." (NYSCEF 1178.[43]) Because the Court expressly did not "decide[]" the "issue" underlying the defense, the law of the case doctrine does not apply. *See Ramanathan v. Aharon*, 109 A.D.3d 529, 530 (2d Dep't 2013) ("The doctrine 'applies only to legal determinations that were necessarily resolved on the merits in [a] prior decision' . . . 'and to the same questions presented in the same case.'"); *Tillman v. Women's Christian Ass'n*, 272 A.D.2d 979, 980 (Fourth Dep't 2000) (malpractice and negligence not the same issue).[44] The Court similarly did not reach the issue of whether the counterclaims plausibly stated a claim based on James's decisions to seek dissolution of the NRA, an injunction against solicitation, and removal of Wayne LaPierre.

Finally, insisting that the NRA cannot adequately plead its defense even on the detailed record her own statements create, the NYAG misstates the standard governing the necessary "causal link." Contrary to the Motion's framing, in a civil action, the NYAG's animus need only

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[41] NYSCEF 706 (when Attorney General sued in her personal capacity, she is immune to such judicial phase-based claims).

[42] NYSCEF 706 (when Attorney General sued in official capacity based on the judicial proceeding, such lawsuit can be brought only in another court).

[43] *Briggs v. Chapman*, 53 A.D.3d 900, 901 (3d Dep't 2008). In *Briggs* (cited by the NYAG), the court found that lake owners had no right to raise its level, which was the exact issue that subsequent lake owners could not relitigate. In contrast, the Court here never addressed the defenses.

[44] The NYAG cannot plausibly claim the NRA's defenses were fully litigated. The NRA's appeal of the dismissal of the counterclaims does not and cannot encompass them. Plus, a claim to which the defenses relate was asserted by the NYAG ***after*** the briefing and oral argument on the prior motion.

be a "substantial cause" — not the "but for cause" —of her adverse action.[45] Regardless, whether the appropriate test is "but for cause" or "substantial cause," it invariably involves a factual issue for the jury.[46]

2. The NRA's Equal Protection Defense

A "selective prosecution [claim] requires . . . 'that the law has been administered 'with an evil eye and an unequal hand.'" NYSCEF 706. Compared to others similarly situated, the NYAG treated the NRA selectively, for impermissible reasons. "The 'similarly situated' element . . . asks 'whether a prudent person, looking objectively at the incidents, would think them roughly equivalent.'" NYSCEF 706.[47]

The NYAG argues—without merit—that the Court's dismissal of the counterclaims precludes the equal protection defense. ***First***, as noted above, by its express terms, the Court's opinion did not reach the issue of whether the Counterclaims stated an equal protection claim based

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[45] C*hizmar v. Borough of Trafford*, 2011 WL 1200100, at *17 (W.D. Pa. Mar. 29, 2011) ("If the claim is considered criminal in nature, the . . . claim requires the absence of probable cause. If civil in nature, [it does not]."); *Gearin v. Maplewood*, 780 F. Supp. 2d 843, 861 (D. Minn. 2011) ("[plaintiff] must prove . . . a lack of probable cause for the . . . criminal citations [but] not [for civil] regulatory decisions"). The NRA appealed the Court's June 10, 2022 dismissal of its counterclaims. Exhibit 46.

[46] *McAdams v. Ladner*, 608 F.Supp.3d 416,431-32 (S.D. Miss. June 23, 2022) (causation in retaliation cases typically a "jury question"); *Rafferty v. Hempstead Union Free Sch. Dist*., No. 218CV3321, 2020 WL 7024311 at *10 (E.D.N.Y. Nov. 30, 2020) (causation in First Amendment retaliation cases properly decided by factfinder); *Haverda v. Hays Cnty*., 723 F.3d 586, 595-96 (5th Cir. 2013) ("summary disposition of the causation issue in . . . retaliation claims is generally inappropriate"); *Tao v. Freeh*, 27 F.3d 635, 639-41 (D.C. Cir. 1994) (causation elements in employment retaliation cases are questions of fact ordinarily for the jury); *Click v. Copeland*, 970 F.2d 106, 113-14 (5th Cir. 1992) (whether "protected conduct was a substantial or motivating factor" is "a question of fact").

[47] *Sonne v. Bd. of Trustees*, 67 A.D.3d 192, 203 (2d Dep't 2009) ("[e]xact correlation is neither likely nor necessary").

on the NYAG's decision to file this action or seek dissolution. ***Second***, whether the comparator cases the NRA cites are "roughly equivalent" for purpose of equal protection jurisprudence is an issue that the jury should decide.[48]

B. The Court should sustain the unclean hands defense.

Because the NYAG seeks equitable relief,[49] she "must come [to this court] with clean hands." *See Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814–18 (1945); *Ferolito v. Vultaggio*, 959 N.Y.S.2d 88 (Sup. Ct. 2012). "[F]ar more than a mere banality," this "ancient maxim" "closes the doors of a court . . . to one tainted with inequitableness or bad faith relative to the matter." *Precision Instrument Mfg. v. Auto. Maint.*, 324 U.S. 806, 814–18 (1945); *Amarant v. D'Antonio*, 197 A.D.2d 432, 434 (First Department 1993); 1 J. Story, Equity Jurisprudence § 98, at 98 (14th ed. 1918) (unclean hands is a "fundamental principle[]" of "equity jurisprudence"). It applies "however improper [was] the [defendant's] behavior." *Precision*; *Amaran*t; *United for Peace & Just. v. Bloomberg*, 783 N.Y.S.2d 255, 259-60 (Sup. Ct. 2004) ("plaintiff's [actions] demonstrate[d] that it lack[ed] the clean hands that are a prerequisite for . . . equitable relief—regardless of any alleged . . . wrong attributable to defendants" (emphasis added)). After all, the doctrine denies "[r]elief . . . not as a protection to a defendant, but as a

[48] The Court held the comparators the NRA cited were inapposite because prior management in those cases was gone. That does not render them irrelevant. The NYAG's allegations lack merit but, even if they do not, other relief short of dissolution is adequate to address the alleged problem. If the NYAG's claims have merit, removal of management and other remedies the NRA seeks would adequately address the problem, rendering the remedy of dissolution unnecessary and the NRA's comparators on point.

[49] NYSCEF 646 page 6 ¶ 14.

disability to the plaintiff and as a matter of public policy in order to protect the integrity of the court." *Farino v. Farino*, 88 A.D.2d 902, 903 (2d Dep't 1982).

Importantly, unclean hands applies even if "[plaintiff's] misconduct" does not "justify legal proceedings [against the plaintiff] of . . . any character." *Jennings v. Foremost Dairies*, 235 N.Y.S.2d 566, 580 (Sup. Ct. 1962) (quoting *Precision*). Any willful act is sufficient as long as it "concern[s] the cause of action" and "can be said to transgress equitable standards of conduct." *Id.* (same). The doctrine is "rooted in the historical concept of a court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith." *Id.* (dismissing action for an injunction and declaratory relief on, among others, unclean hands grounds); *Precision*, 324 U.S. at 814–18. "In determining . . . unclean hands, [the Court has] discretion to do what is fair, proper, and just." *Toobian v. Golzad*, 193 A.D.3d 784, 788 (2d Dep't 2021).

This lawsuit is the Plaintiff's attempt to weaken a political opponent and to silence disfavored speech. James repeatedly and publicly pledged to her voters, supporters, and others to do everything she could, including to file this lawsuit, to eliminate the NRA because of the substance of its constitutionally protected speech. A government official's use of her constitutional or statutory powers is plainly improper. James's actions are undoubtedly willful, clearly "transgress[] equitable standards," and indisputably relate to this action. Therefore, she is precluded from seeking equitable relief. That is so "however improper [according to her allegations] may have been the behavior of the [NRA]." *Precision; Amarant; United for Peace & Just.*, 783 N.Y.S.2d at 259-60.

The NYAG argues that ***she*** can obtain equitable remedies even if the jury finds that she has unclean hands. NYSCEF 1178 page 12.[50] Specifically, James claims that because she is a government official, rules applicable to ordinary plaintiffs do not apply. *Id.* She argues that, for a defense asserted against her in this case, proof that she acted in bad faith or inequitably alone is insufficient. Rather, the NYAG claims, the NRA must allege prejudice of constitutional proportions with a clear connection to her misconduct. Id. The NYAG, however, offers no valid basis for this demanding test. Thus, the Court should overrule the NYAG's objection and sustain the defense.[51]

The only New York cases the NYAG cites—a First Department decision in *People v. Trump Entrepreneur Initiative* and an earlier "Trial Order" in the same case—are inapposite. The Appellate Division did not specifically address the unclean hands defense. It merely stated in a single sentence in a lengthy opinion that the trial court was correct to dismiss "the seven affirmative defenses at issue." 2014 WL 5241483 at *12. Although the defendant appealed several of the trial court's rulings, it did not appeal the dismissal of the unclean hands defense. As a result, the First Department's passing reference to the trial court's "correct" dismissal of all defenses at issue has

[50] There is no question that the unclean hands defense would be tried to a jury. For example, the NYAG's related party transaction claim against the NRA (Thirteenth Cause of Action) is asserted under N-PCL 112(a)(10), which provides for equitable remedies (which the NYAG in fact seeks) and, under N-PCL 112(a)(10) and 112(b)(1), any claims asserted under N-PCL 112(a)(10) must be tried to a jury.

[51] The NYAG does not argue that there is nothing inequitable about a government official's misuse of her constitutional and statutory powers to pursue a disfavored speaker or a political opponent, effectively conceding that—if the extra requirements she urges do not apply—the Answer states an unclean hands defense.

no precedential weight, and there is no appellate authority for NYAG's demanding unclean hands test.

The earlier "Trial Order" similarly does not bind this Court and, in any case, arose in inapposite circumstances. Specifically, in that proceeding—brought and decided before Donald Trump entered politics—the defendant merely claimed that (i) once the proceedings against Trump University (for suspected violations of Executive Law Section 63(12)) were underway, the Attorney General previewed information about his investigation to the media, (ii) discussed the case in news appearances, (iii) proclaimed defendant's fault upon the filing of the lawsuit, and (iv) "harassed" defendants. As a result, the NYAG's reliance on the trial order is wholly misplaced.[52]

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[52] The NYAG argues that, in *Trump Entrepreneur*, Justice Kern "relie[d] on" federal courts' opinions in SEC cases. NYSCEF 1178 page 12 n.7. Even if so, this Court should not. They have been criticized for their flawed reasoning. *SEC v. Cuban,* 798 F. Supp.2d 783, 791 (N.D. Tex. 2011) ("in some respects these decisions cite each other without explaining their reasoning, some rely on opinions that can be traced to a misplaced interpretation of [prior caselaw], and others reach this result without explaining in more than conclusory terms the rationale for holding that the defense is unavailable as a matter of law"). Nor did they involve allegations of improper use of official power to pursue a disfavored speaker or a political enemy. *SEC v. Rosenfeld,* No. 97 Civ. 1467 (RPP), 1997 WL 400131 (S.D.N.Y. July 16, 1997); *Cuban,* 798 F. Supp.2d 783; *SEC v. Electronics Warehouse,* 689 F. Supp. 53 (D. Conn. 1988), *aff'd sub nom., SEC v. Calvo,* 891 F.2d 457 (2d Cir. 1989). And they derive from Supreme Court precedent, cited in *Electronics Warehouse*, that emphasizes that the generally applicable unclean hands maxim applies to the government just like it applies to other litigants (and any holdings to the contrary occurred in inapposite contexts). *Schweiker v. Hansen*, 450 U.S. 785, 788 (1981) (Social Security recipient could not estop the government from denying retroactive payments where a Social Security Administration employee mistakenly advised her she was ineligible) (cited in *Electronics Warehouse*); *Heckler v. Community Health Serv.*, 467 U.S. 51, 60 (1983) (estoppel against the government was unavailable based on a representation by a governmental agent concerning availability of Medicare funds on which the party should not have relied); *Pan American Co. v. United States*, 273 U.S. 456, 506 (1927) (in a case involving use of public land, noting that, with potential exceptions inapplicable here, concepts of equity can be invoked against the government).

"[F]or most litigation purposes[,] the law treats a government entity just like any other party." *Frey v. Dep't of Health*, 106 F.R.D. 32, 37 (E.D.N.Y. 1985); *United States v. Procter & Gamble*, 356 U.S. 677, 678 (1958) (government is subject to same rules of discovery); see also CPLR 3102(f). In fact, "the government also [must] advance the public's interest in achieving justice, an ultimate obligation that outweighs [the government's] narrower interest in prevailing in a law suit." *Frey,* 106 F.R.D. 32, 37 (E.D.N.Y. 1985).

Moreover, the decision in Trump Entrepreneur Initiative to impose extra requirements on the unclean hands defense was premised on the ***undisputed*** assertion that the "governmental agency [there was] attempting to enforce a congressional mandate ***in the public interest***." Inexplicably, in urging the Court to adopt the stringent unclean hands defense test in her brief, the NYAG omits this important part of the test. NYSCEF 1178 pages 12-14. As discussed below, she cannot meet it.

C. The NRA's defenses set forth in Paragraphs 33-35 raise genuine issues of fact for trial.

The NYAG's claims and requests for remedies fail and are precluded because, while the relief the NYAG seeks (anti-solicitation injunction and appointment of compliance monitor of administration of assets) would necessarily have significant extra-territorial application outside the state of New York, the Court has no authority to apply statutes extra-territorially in the absence of clear legislative intent.

In attacking this defense, the NYAG claims that the Court already rejected it, but when the Court denied the NRA's motion to dismiss the First Cause of Action, as the transcript of the oral argument on September 29, 2022 reflects, the only issue it considered was whether the NYAG

could seek extra-territorial relief pursuant to its First Cause of Action.[53] As a result, there is no conceivable law-of-the-case basis for dismissing the NRA's extra-territoriality defenses in relation to the NYAG's other claims.

And the Court's prior ruling pertaining to the First Cause of Action was much more limited than the NYAG says. The Court merely stated that it was "uncomfortable with . . . at a very early stage of the case before any facts have been proven . . . limit[ing] the scope of remedies"[54] and, in announcing its ruling, the Court specifically stated that it was not "reach[ing] the question of what remedy one might . . . permissibly apply."[55]

That the extra-territoriality defense is not "supported by any case law or legislative history" (NYSCEF 1178) similarly is not a reason for dismissing the defense. Courts are without power to apply statutes extra-territorially without clearly expressed legislative intent. Goshen v. Mut. Life, 730 N.Y.S.2d 46, 47 (1st Dep't 2001); S.H. v. Diocese of Brooklyn, 167 N.Y.S.3d 171, 177 (2nd Dep't 2022); Rodriguez v. KGA, 64 N.Y.S.3d 11, 13 (1st Dep't 2017). A statute that is silent on the issue should not be applied extra-territorially.

By referring to the defenses in Paragraphs 33-35 of the Answer as "extra-territoriality defenses," the NYAG trivializes them. They also point out that the NYAG does not even allege that the assets over which she seeks equitable relief are held or administered for charitable purposes (whether in New York or elsewhere). Thus, even if there were a basis for striking the extra-territoriality defenses—there is not—the NYAG has offered no basis for striking the rest.

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[53] Transcript of oral argument on September 29, 2022. NYSCEF 847.

[54] *Id*. at 27:18-21.

[55] *Id.* at 76:22-23.

D. The NYAG is not immune to estoppel and other defenses.

The NYAG also argues that certain defenses are "not available" to the NRA, because "the State is acting in the public interest."[56] NYSCEF 1178 page 20. But the authorities the NYAG cites—which involve land-use disputes between states and municipalities and determinations about civil-service rank—fail to articulate any broad prohibition against equitable defenses to government lawsuits. And critically, even assuming that an enforcement action in the "public interest" did immunize the NYAG against such defenses, the NYAG's motives in this case are an issue of fact—one sharply contested by the NRA.

The NYAG relies on three cases—two of which are decades old. In *Capruso v. Vill. of Kings Point*, 23 N.Y.3d 631 (2014), members of the public sued under the public trust doctrine to prevent a municipality's deforestation of parkland. In response, the municipality noted that the disputed lands were already used for nonpark purposes. *Id.* at 638. After amici warned that the town's statute of limitations defense, if granted, would amount to "adverse possession" and would "decimate the public trust doctrine and threaten parkland throughout the state," the court struck the statute of limitations and laches defenses on the dual grounds that (i) the state was "protect[ing] a public interest" and (ii) the misuse of the land was a continuing wrong. *Id*. at 636. But the NYAG does not argue "continuing wrong" here, and a laches defense would impact the NRA only—not impair the state's title to vast swathes of parkland.

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[56] Further, the NYAG has no basis for insisting on specific factual predicates for the defenses at this time. The bases on which these defenses may apply will become clear at trial. For example, if the NYAG intends to put at issue events that occurred decades ago, the NYAG's delay in bringing the proceeding will likely become an issue if the witnesses to the events at issue are unavailable. Republic of Turkey v Christie's Inc., 2023 WL 2395412, at *4 (2d Cir. Mar. 8, 2023) (stating laches elements; knowledge element may be established where a plaintiff "should have known").

In *City of New York*, 60 N.Y.2d 436, 449 (1983) (cited in NYSCEF 1178 at page 20), an army reservist was erroneously awarded active military duty credit for being activated in the time of war to address a domestic postal workers' strike. Thus, he was promoted ahead of his similarly situated peers. After the Court determined that credits were unwarranted, it rejected the argument that the city was estopped from rescinding the previously awarded credit. *Id.* The court noted that "estoppel may not be applied to preclude a State or municipal agency from discharging its statutory responsibility," "particularly . . . where, . . . the estoppel is sought to be applied to perpetuate an appointment based on a misreading of constitutional and statutory requirements." *Id*. Here, estoppel is not asserted to prevent the NYAG from reneging on an administrative determination.

In *Jamestown Lodge v. Catherwood*, 297 N.Y.S.2d 775, 776 (3d Dep't 1969), a tax authority ordered an employer to pay taxes. After the employer demanded a hearing, the referee failed to schedule it for 3 years. The delay did not estop the government. Under the statute, the payment of contributions could be enforced within "two years after . . . determination of liability . . . became final." Separately, the court stated: "Laches, waiver, or estoppel may not be imputed to the State in the absence of statutory authority. . . . ***This rule is generally applied in connection with tax matters***." *Id.* (emphasis added). Of course, this case is not a tax dispute.

Finally, and critically, this case differs from all authorities NYAG cited because the "public interest" impetus of this action has not been established, and instead is sharply contested. Although she now asserts that the protection of the public interest is what motivates her actions in this case, as shown above, she previously claimed repeatedly that her motivation for bringing her claims for relief are irrelevant to this action. In fact, she made such representations to the Court and obtained protective orders to avoid providing the NRA with any discovery on the issue on that

specific basis.[57] As a result, she cannot move to dismiss defenses based on a mere assertion in a brief of her alleged intent.[58]

Lastly, on September 29, 2022, Assistant Attorney General Steven Shiffman told the Court that the compliance monitor whose appointment the NYAG seeks would not report to the NYAG.[59] A basis for the NRA's estoppel and waiver defense is his statement. The NYAG offers no basis upon which the defense should be dismissed.

V.
CONCLUSION

For the reasons above, the Court should deny the NYAG's motion in its entirety.

Dated: March 13, 2023
New York, New York

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[57] NYSCEF 804 page 7.

[58] Notably, on March 2, 2022, the Court stated: "The malfeasance alleged . . . – if proven – is . . . troubling, but the Attorney General does not allege that the NRA's mismanagement . . . 'has produced, or tends to produce, injury to the public'." NYSCEF 609, 610, and 611, page 24.

[59] Exhibit 47 at page 61.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was electronically served via the Court's electronic case filing system upon all counsel of record, on this 13th day of March 2023.

s/ *Svetlana M. Eisenberg*
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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 in opposition filed by the NRA complies with the word count limit set forth in the Order permitting filing of a memorandum of law in opposition, because it contains fewer than 7,000 words. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law.

s/ *Svetlana M. Eisenberg*
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