

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,

-against-

THE NATIONAL RIFLE ASSOCIATION OF  
AMERICA, WAYNE LAPIERRE, WILSON  
PHILLIPS, JOHN FRAZER, and JOSHUA  
POWELL,

Defendants.

and

THE NATIONAL RIFLE ASSOCIATION OF  
AMERICA,

Defendant-Counterclaim Plaintiff,

-against-

LETITIA JAMES, ATTORNEY GENERAL OF  
THE STATE OF NEW YORK, IN HER  
OFFICIAL AND INDIVIDUAL CAPACITIES,

Plaintiff-Counterclaim Defendants.

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**MEMORANDUM OF LAW IN OPPOSITION TO  
ATTORNEY GENERAL'S MOTION TO DISMISS  
THE NATIONAL RIFLE ASSOCIATION'S COUNTERCLAIMS**

INDEX NO.: 451625/2020

Motion Seq. No. 13

ORAL ARGUMENT  
REQUESTED

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Defendant-Counterclaim Plaintiff The National Rifle Association of America (“NRA” or “Association”) respectfully submits this memorandum of law in opposition to Plaintiff-Counterclaim Defendant New York Attorney General Letitia James’s (“NYAG” or “James”) motion to dismiss (the “Motion to Dismiss”) the NRA’s Counterclaims, set forth in its Amended Verified Answer and Counterclaims, filed on July 20, 2021 (the “Counterclaims”) (NYSCEF No. 325).

### **PRELIMINARY STATEMENT**

Attorney General James campaigned for office in 2018 on the promise that, if elected, she would leverage the oversight power of the NYAG to “go after” and “take down” the NRA. (Counterclaims at ¶¶ 4, 17). She publicly called the NRA’s advocacy “poisonous” and “deadly propaganda.” (*Id.* at ¶ 4). Her animus undisguised, she leveled accusations that the NRA is engaged in “terrorism” and is a “criminal enterprise.” (*Id.*). In an obvious attempt to chill the willingness of others to associate with the NRA, she vowed to “take on” the Association and institutions that do business with it, including its banking relationships. (*Id.* at ¶ 17). Soon after taking office, James commenced a sweeping, invasive investigation in an attempt to find any justification to dissolve the NRA. Despite dozens of interviews, the collection of voluminous documents, and partnering with individuals terminated by the Association for having violated their duties to it, James found no facts to justify dissolution of the NRA. Nevertheless, she commenced this action to fulfill her campaign promises and now seeks what courts have called a corporate “death sentence.”<sup>1</sup>

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<sup>1</sup> In addition to the shocking statements as set forth in the Counterclaims, James has publicly made the following statements threatening the NRA, among others:

- The NRA “is an organization that needs to be held accountable for the destruction and the loss of lives . . . across our nation.” (<http://liherald.com/stories/nassau-protests-nra-fundraiser,107617> (Oct. 25, 2018))

In fact, the NYAG's Amended Complaint consists, almost exclusively, of allegations of self-dealing against individual employees and vendors, many of whom were fired by the NRA absent any action by James. Such allegations, even if true, amount to the sort of executive misconduct historically resolved through actions against individuals, or remedial reforms adopted through an entity's board of directors. Rather than seek such resolutions as the narrowest means to achieve the public interest, as she is required to do, James seeks to eliminate the NRA, just as she promised. James has been criticized by civil liberties advocates, including the ACLU (Counterclaims at ¶¶ 5, 16), and now confronts the constitutional claims that her abuse of power predictably provoked.

The NRA alleges seven Counterclaims:

- **First and Second Counterclaims:** Brought under 42 U.S.C. § 1983, alleging that James, in her individual and official capacities, violated the NRA's rights under the First and Fourteenth Amendment of the U.S. Constitution, and under Article I, Section 8 of the New York State Constitution, by subjecting the NRA to investigation and litigation in retaliation for the NRA's constitutionally protected speech;
- **Third and Fourth Counterclaims:** Brought under 42 U.S.C. § 1983, alleging that James, in her individual and official capacities, violated the NRA's rights under the Fourteenth Amendment, and under Article I, Section 9 of the New York State Constitution, by subjecting the NRA to investigation and litigation in retaliation for its members' exercise of their association rights;
- **Fifth and Sixth Counterclaims:** James, in her individual and official capacities, violated the Fourteenth Amendment and Article I, Section 11 of the New York State Constitution by selectively enforcing New York Not-for-Profit Corporation law against the NRA to suppress the NRA's constitutionally protected speech; and

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- "Let me be clear: when I take office I will investigate the non-profit status of the NRA & take every legal step I can to help ensure another life isn't lost to senseless gun violence. #GunControlNow." (@TishJames Twitter post (November 8, 2018)).
  - Touting her "work[] to eliminate the NRA" as a reason why voters should support her now-suspended candidacy for Governor. (<https://ijr.com/new-york-attorney-general-letitia-james-run-governor>) (October 29, 2021) (last visited January 9, 2022).

- **Seventh Counterclaim:** The NRA is entitled to declaratory judgment under CPLR 3001 that New York Not-For-Profit Law Sections 1101 and 1102 are unconstitutional as-applied to the NRA.

The NRA seeks declaratory judgments that James violated, and continues to violate: (a) NRA's rights to free speech under both the United States and New York State Constitutions; (b) NRA's equal protection rights under both the United States and New York State Constitutions; and (c) NRA members' rights to free association under both the United States and New York State Constitutions. The NRA also seeks a declaratory judgment that Sections 1101 and 1102 of New York's Not-for-Profit Law are unconstitutional insofar as they may be used, as the NYAG attempts to do here, to dissolve organizations engaged in constitutionally protected activities based solely on allegations of executive looting. The NRA also demands damages as against James in her individual capacity.

The NRA's Counterclaims are adequately alleged, and deserve discovery, which has yet to begin and which is being resisted by the NYAG. Although James insists that she should not have to answer for her blatant violations of federal and state law, her arguments are without merit.

For the reasons set forth below, the NYAG's Motion to Dismiss should be denied in its entirety.

## **ARGUMENT**

### **I. Standard on Motion to Dismiss**

The NYAG has moved to dismiss the Counterclaims pursuant to CPLR 3211(a)(2) for lack of subject matter jurisdiction and pursuant to CPLR 3211(a)(7) for failure to state a claim.<sup>2</sup>

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<sup>2</sup> The NYAG moves to dismiss under CPLR 3211(a)(2) claims for monetary damages against James in her official capacity for lack of subject matter jurisdiction based on sovereign immunity. (Attorney General's Memorandum of Law in Support of Motion to Dismiss ("NYAG Mem.") (NYSCEF No. 279) at 26). However, the NYAG's Motion to Dismiss addresses the NRA's first filed Counterclaims. In its amended Counterclaims, the NRA is seeking monetary damages against James only in her individual capacity. (Counterclaims at ¶¶ 73, 86, 97, 106, 117, 129). Accordingly, the NYAG's motion to dismiss under CPLR 3211(a)(2) is moot.



It is well established that “[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction’ and the court is to ‘accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.’” *Schmidt-Sarosi v. Offices for Fertility and Reproductive Medicine, P.C.*, 150 N.Y.S.3d 75, 77, 195 A.D.3d 479 (1st Dep’t 2021) (quotation omitted); *see also Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 104 A.D.3d 401, 403 (1st Dep’t 2013) (reversing lower court and denying motion to dismiss counterclaims pursuant to CPLR 3211(a)(7)). Thus, a motion to dismiss pursuant to CPLR 3211(a)(7) “must be denied if from the pleadings’ four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law.” *Siegmund Strauss, Inc.*, 104 A.D.3d at 403.

Moreover, under CPLR 3211(a) (7), “the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party,” and “unless it has been shown that a material fact as claimed by the pleader to be ... not a fact at all and unless it can be said that no significant dispute exists regarding it ... dismissal should not eventuate.” *D. S. v. Positive Behavior Support Consulting and Psychological Resources, P.C.*, 151 N.Y.S.3d 690, 692, 197 A.D.3d 518 (2d Dep’t 2021) (quoting *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977)). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.” *Id.*

As set forth below, the NRA has sufficiently alleged its Counterclaims and the Motion to Dismiss should be denied in its entirety.

## II. The NRA Sufficiently Alleged its Counterclaims

### A. The NRA Sufficiently Pled the Elements of its First, Second, Third, and Fourth Counterclaims for Retaliation in Violation of the First and Fourteenth Amendments of the U.S. Constitution and Article 1, Sections 8 and 9 of the New York State Constitution

The NYAG groups the NRA's First, Second, Third, and Fourth Counterclaims as the "Retaliation Counterclaims," concerning allegations "that the Attorney General's investigation of the NRA and commencement of this Action constitute unconstitutional retaliation against the NRA and its members for engaging in political speech." (NYAG Mem. at 8). The NYAG argues that the NRA fails to sufficiently plead the elements of a retaliation claim under the First Amendment and under the New York State Constitution. (*Id.* at 10-14).

To state a First Amendment retaliation claim sufficient to withstand a motion to dismiss, a plaintiff must allege "(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action." *Dolan v. Connolly*, 794 F.3d 290, 294 (2d Cir. 2015).

It is clear that "[t]he rights of free speech and free association flowing from the First Amendment are protected liberty interests." *Zaretsky v. New York City Health and Hospitals Corp.*, 84 N.Y.2d 140, 145 (1994). Moreover, it has "long been recognized that the constitutional guarantees of freedom of speech and assembly necessarily imply like protections for the freedom of association." *Curle v. Ward*, 46 N.Y.2d 1049, 1052 (1979) (Wachtler, J. dissenting) (citing *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)). "Since speech, assembly and association all serve a common purpose to promote the free exchange of ideas defeating any one of these rights might defeat them all. Freedom of association therefore stands as a fundamental right in a free society." *Id.* (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)).

Activity interfering with associational rights must “serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.” *Tabbaa v. Chertoff*, 509 F.3d 89, 102 (2d Cir. 2007) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623-22 (1984) (“[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”)).

Importantly, even on a motion for summary judgment, much less on a motion to dismiss, “Courts have traditionally held that [it] is inappropriate to resolve complicated questions of motive and intent” of a defendant in a § 1983 action charging that the defendant had violated Federal and State Constitutional rights, because “without a searching inquiry” and with an incomplete record, a “determination that plaintiffs’ political activities and affiliations were not a motivating factor” is not possible, and “those intent on punishing the exercise of constitutional rights could easily mask their behavior behind a complex web of post hoc rationalizations.” *McManus v. Grippen*, 244 A.D.2d 632, 632 (3d Dep’t 1997).

**1. The NRA’s Rights of Free Speech and of Association are Protected by the First Amendment.**

The NRA alleges, with detailed and specific examples of James’s threats before even being elected Attorney General, that she has conducted a retaliation campaign against the NRA and its members based on her disagreement with the content of their speech. (*See Counterclaims at ¶¶ 4, 17-20, 55-57, 64-68, 78-81, 92-94, 101-103*).

The NYAG does not challenge the NRA’s allegations that its right to free speech and association are protected. Instead, the NYAG seeks to distract from the NRA’s well-pled allegations and discusses the NYAG’s unsubstantiated allegations *against the NRA*:

The NRA does not contend, and could not, that the conduct at issue in this Action—misrepresentations, fraud, self-dealing, looting of charitable assets, waste, false filings—is protected. There is no constitutionally protected right to use charitable funds on no-show consulting contracts, for lavish expenditures for insiders, and other violations of applicable law.

(NYAG Mem. at 11). This is a red herring. The NRA is alleging that James has taken retaliatory action actions against the NRA, including the investigation of the NRA and commencement of this dissolution proceeding, directly in response to, and substantially motivated by, the NRA’s advocacy in support of the Second Amendment. (See Counterclaims at ¶¶ 20, 43, 65, 66, 68, 79, 81, 94, 101, 103, 113, 125). The NRA is not contending that malfeasance (if proved) is protected speech. The relevant allegations are the NRA’s well pled allegations that James acted in retaliation against the NRA because it is a political foe and based on the NRA’s protected speech, which the NYAG does not—and cannot—challenge.

**2. The NRA Sufficiently Pled a Causal Connection Between the NRA’s Protected Speech and the Adverse Action.**

“In the context of a First Amendment retaliation claim, ‘[a]n adverse action is defined as retaliatory conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights.’ *Brandon v. Kinter*, 938 F.3d 21, 40 (2d Cir. 2019); *Mirro v. City of New York*, 159 A.D.3d 964, 967 (2d Dep’t 2018) (same).

The test for what constitutes adverse action “is objective, and the plaintiff is not required to show that he was actually deterred.” *Mazyck v. Keller*, 531 F.Supp.3d 630, 645 (S.D.N.Y. 2021) (quoting *Brandon*, 938 F.3d at 40). Thus, “[c]hilled speech is not the *sine qua non* of a First Amendment claim. A plaintiff has standing if he can show *either* that his speech has been adversely affected by the government retaliation or that he has suffered some other concrete harm. Various non-speech related harms are sufficient to give a plaintiff standing.” *Id.* (quoting *Dorsett v. Cnty. of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013)).

Furthermore, a plaintiff “can establish a causal connection that suggests retaliation by showing that protected activity was close in time to the adverse action.” *Mazyck*, 531 F.Supp.3d at 646 (quoting *Espinal v. Goord*, 558 F.3d 119, 129 (2d Cir. 2009)) (denying motion to dismiss when plaintiff “plainly alleges a causal connection between the protected activity and the adverse actions”).

The NYAG’s arguments seeking dismissal fail.

First, as a matter of law, a motion to dismiss based on causation is premature. The record regarding James’s activities and motivations is not only incomplete, but the NYAG has resisted any discovery on the NRA’s claims. This is a quintessential case where James, intent on punishing the NRA for its exercise of constitutional rights, seeks to hide behind “post hoc rationalizations.” *See McManus*, 244 A.D.2d at 632. Accordingly, discovery of James is required before the question of causation can be fully determined and the Motion to Dismiss should be denied on those grounds alone.

Second, the NYAG argues that the NRA fails to plead causation because “instead of moving to dismiss the Complaint on substantive grounds, the NRA filed Counterclaims challenging only the Dissolution Claims.” The NYAG continues: “The NRA has not challenged the propriety of the other 16 causes of action in the Complaint. By admitting that many allegations in the Complaint are, in fact, true, and not contesting that the Complaint states causes of action against it, the NRA cannot establish but-for causation.” (NYAG Mem. at 12). The Motion to Dismiss here is stale. The NRA has moved to dismiss all of the claims asserted against it by the NYAG, and the motion is pending. (NYSCEF No. 363-371, Motion Seq. 18). In any event, it is simply false to state, as the NYAG does, that the NRA has not “contested” the allegations in the Complaint.

Third, the NYAG's argument is irrelevant. The NRA sufficiently alleges a causal connection between the NRA's protected speech and James taking adverse action against the NRA. James's pattern of repeated threats against the NRA as a candidate for Attorney General was followed almost immediately after her assuming office in early 2019 by the investigation of the NRA (Counterclaims at ¶ 19), and the subsequent commencement of this dissolution action. That the protected activity was close in time to the adverse action suggests illegal retaliation. *Mazyck*, 531 F.Supp.3d at 646.

Indeed, as alleged in the Counterclaims, James's elected predecessor in office, Attorney General Eric Schneiderman, in 2017 warned the NRA that he was being urged to use his office in support of politically motivated efforts against the NRA. In a telephone call to Tom King, an NRA director, Schneiderman emphasized that while he opposed the NRA's positions on the Second Amendment, he was troubled by pressures being placed on him by Governor Andrew Cuomo and others to weaken the NRA as a political force in 2020. Schneiderman advised King to "get ready." (Counterclaims at ¶ 14). It was *only* after James was elected based upon her threat, among others, that her "top issue" would be "going after the NRA because it is a criminal enterprise" (Counterclaims at ¶ 17) that her pre-textual investigation led to the commencement of this dissolution action.

Fourth, the NYAG further contends that the fact that the NRA undertook a sustained effort to reform its internal governance, noting "the NRA Board's push for additional documentation and transparency" and the firing by the NRA of a former officer who is a co-defendant in this case (Counterclaims at ¶¶ 7, 15, 43), shows that the "NRA's pleadings admit that the NYAG's investigation and complaint were not baseless." (NYAG Mem. at 12). This argument turns the NRA's allegations on their head. As alleged in the Counterclaims, James was aware that the NRA

had undertaken compliance reforms by 2018, but nonetheless continued with her politically motivated investigation and dissolution action, that shows her retaliatory motives. (Counterclaims at ¶ 44). Indeed, as alleged in the Counterclaims, the NYAG's Complaint contains only one sentence concerning the NRA's reform, stating in conclusory fashion that reform would be "futile." (Counterclaims at ¶ 52, citing Complaint at ¶ 663).

Similarly, the NYAG's citation (NYAG Mem. at 12-13) to certain findings and *dicta* of the U.S. Bankruptcy Court in Texas is misplaced.<sup>3</sup> Judge Hale's findings contradict, rather than support, the NYAG's argument that the investigation and dissolution action are not based on a retaliatory motive. The Counterclaims set forth multiple findings by Judge Hale that, by 2018, the NRA had undertaken a sustained course correction by increasing its commitment to internal compliance and governance. (Counterclaims at ¶¶ 26-32). Yet, knowing this, James commenced her pre-textual investigation and retaliatory dissolution action.

### **3. The NRA Has Sufficiently Pled Injury as a Result of the NYAG's Adverse Action**

It is well established "at the pleading stage of the litigation, the plaintiffs' burden of alleging that their injury is 'fairly traceable' to the challenged act is relatively modest." *Guan v. Mayorkas*, 530 F.Supp.3d 237, 262 (E.D.N.Y. 2021). "Government action can constitute a direct and substantial interference with associational rights even if there is no prior restraint and no clear chilling of future expressive activity . . . when government action substantially penalizes members of a group for exercising their First Amendment rights, that penalty in itself can constitute a substantial burden, even if the government did not prevent the group from associating and

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<sup>3</sup> In support of her position that the dissolution action was based on the NRA's alleged "misconduct," the NYAG relies primarily on statements by Judge Hale regarding his concerns about events surrounding the decision by the NRA to commence its bankruptcy proceeding. (NYAG Mem. at 12-13). However, that proceeding was commenced in January 2021, well after the NYAG's investigation began and this dissolution action was commenced, making those statements of Judge Hale's wholly irrelevant to James's retaliatory actions.

regardless of any future chilling effect.” *Tabbaa*, 509 F.3d at 102 (citing *Healy v. James*, 408 U.S. 169, 181–84, 92 (1972)). Thus, “the Constitution’s protection is not limited to direct interference with fundamental rights.... ‘Freedom[s] [under the First Amendment] are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.’” *Guan*, 530 at 260 (quoting *Healy*, 408 U.S. at 181).

In *Guan*, the court held that the plaintiffs had “plausibly alleged that their associational and expressive rights were injured” by inspections and processing to which they were subjected at the U.S.-Mexico border. *Id.* The court held that the plaintiffs had sufficiently alleged that they were singled out for such inspections and scrutiny—during which they were asked questions beyond the regular scope of inspections, and their personal information was collected—specifically because they covered conditions at the border as photojournalists. *Id.* at 260-261. The court stated that “[w]hen the Government subjects a specific group to a burden such as extensive processing, ‘the prospect of being singled out for such extensive processing could reasonably deter others from associating’ in the future, thereby ‘implicat[ing] the protections of the First Amendment.’” *Id.* at 266 (citing *Tabbaa*, 509 F.3d at 102). The plaintiffs thus had sufficiently pleaded an “injury-in-fact . . . in the form of the scrutiny they experienced.” *Id.* at 262.

Furthermore, “impairment may come in the form of an organization being ‘force[d] to] divert money from its other current activities to advance its established organizational interests’ or where an organization has to spend ‘money to combat activity that harms its organization’s [sic] core activities.’” *Pen Am. Ctr., Inc. v. Trump*, 448 F. Supp. 3d 309, 325 (S.D.N.Y. 2020) (citing *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110-11 (2d Cir. 2017)).



Here, the NYAG argues that the NRA has only alleged “an abstract threat,” in its “assertion that the investigation and request for judicial dissolution ‘threaten[] to destroy the NRA and chill the speech of the NRA’” and its members. (NYAG Mem. at 13).<sup>4</sup> To the contrary, however, the NRA’s allegations of James’s threats against the NRA are far from abstract, they are specific and numerous. (*See* Counterclaims at ¶¶ 16-18).

The NRA alleges that James’s actions have injured the NRA’s rights to engage in Second Amendment advocacy and will continue to result in significant damages, including, but not limited to, damage due to reputational harm,<sup>5</sup> as well as injury to the NRA’s trade, business, or profession.

First, of course, dissolution would eliminate the NRA, which is James’s publicly stated goal, and would confiscate its assets. (*See* Counterclaims at ¶¶ 20, 58, 70, 83, 94, 103).

Second, the NRA alleges that it has incurred, and continues to incur, significant unnecessary expenditures to defend the investigation and litigation initiated by James. Such expenditures have diverted resources away from the NRA’s charitable and advocacy mission. (Counterclaims at ¶ 6). As alleged in the Counterclaims, this injury is particularly ironic given that the NYAG’s pretextual investigation and commencement of this action not only caused the NRA to incur millions of dollars in expenditures, but James then used those expenditures as the basis to claim a violation of New York’s Prudent Management of Institutional Funds Act in support of her demand the NRA be dissolved. (Counterclaims at ¶ 58).

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<sup>4</sup> The NYAG also argues that “[g]iven the NRA’s assertions that it is continuing activities, it has not suffered an actionable injury,” citing *Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001). *Curley* is inapposite. There, the court held, on a motion for summary judgment, that the plaintiff had failed to establish that his speech had been “actually chilled” because despite his arrest allegedly in retaliation for comments he made during a political campaign, he continued his campaign after the arrest and ran again for public office. Here, to the contrary, the NRA adequately alleges various injuries. Moreover, it is ironic the NYAG argues that the NRA is not injured because it is presently continuing its activities when she has explicitly vowed to eliminate the NRA completely.

<sup>5</sup> The NYAG’s argument that “defamation [is] insufficient to establish an injury for a First Amendment retaliation claim,” citing *Zherka v. Amicone*, 634 F.3d 642 (2d Cir. 2011) (NYAG Mem. at 14), is inapposite. Contrary to the NYAG’s contention, *Zherka* does not hold that allegations of reputational harm are inadequate.

Third, as a result of James's threats and reprisals against the NRA, members and prospective members of the NRA have expressed to the Association concerns of harassment and retaliation, both personal and business, including fear that they or their family may be harassed, or that business partners may be pressured to abandon them, especially in New York, where, as a result of James's threats and extreme statements, government officials are perceived as seeking to punish those who support the NRA. (Counterclaims at ¶ 57). Fundamentally, precisely because James singled out the NRA for retaliation, it has suffered injury to its associational and expressive rights. When a government official with the power of the NYAG subjects a specific group to the burden of an investigation and dissolution proceeding, the prospect of being singled out for such invasive and expensive scrutiny "could reasonably deter others from associating" in the future, thereby implicating the protections of the First Amendment. *Tabbaa*, 509 F.3d at 102; *Guan*, 530 F.Supp.3d at 260-62, 266.

Fourth, the NRA alleges that because of her pretextual investigation, the NYAG subpoenaed the NRA's accounting firm, demanding sensitive records, including names of NRA members and donors, as well as voluminous discovery from the NRA in her investigation, which has continued in this action. (Counterclaims at ¶ 19).

All of the allegations described above are sufficient injuries at this stage of litigation.<sup>6</sup> Accordingly, the NYAG's motion to dismiss the NRA's First, Second, Third, and Fourth Counterclaims should be denied.

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<sup>6</sup> In the event the Court may determine that the NRA has not alleged a sufficient injury, the NRA should be granted leave to amend its Counterclaims. *Sheppard-Mobley ex rel. Mobley v. King*, 4 N.Y.3d 627, 638 (2005) ("Because the complaint does not set forth these independent allegations, however, we dismiss the sixth cause of action and remit for [plaintiff] to amend her complaint to plead such injury.").

**B. The NRA Sufficiently Pled the Elements of its Fifth and Sixth Counterclaims for Selective Enforcement in Violation of the Fourteenth Amendment of the U.S. Constitution and Article 1, Section 11 of the New York State Constitution**

A violation of equal protection under the Fourteenth Amendment “arises where [1] first, a person (compared with others similarly situated) is selectively treated and [2] second, such treatment is based on impermissible considerations ... to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.” *Sonne v. Board of Trustees of Village of Suffern*, 67 A.D.3d 192, 203 (2d Dep’t 2009) (quoting *Bower Assoc. v. Town of Pleasant Valley*, 2 N.Y.3d 617, 631 (2004)). In determining whether a plaintiff is similarly situated, “the test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent. Exact correlation is neither likely nor necessary.” *Id.* The plaintiff “must be singled out for an impermissible motive not related to legitimate governmental objectives, which could include personal or political gain, or retaliation for the exercise of constitutional rights.” *Id.* at 203-204; *see also Fields v. Village of Sag Harbor*, 92 A.D.3d 718, 719 (2d Dep’t 2012).

Furthermore, it is well established that with regard to equal protection violations, “[w]here governmental action disadvantages a suspect class or burdens a fundamental right, the conduct must be subjected to ‘strict scrutiny,’ and will be upheld only if the government can establish a compelling justification for the action.” *People v. Aviles*, 28 N.Y.3d 497, 502 (2016); *Alevy v. Downstate Medical Center*, 39 N.Y.2d 326, 332 (1976). Fundamental interests include “the right of free speech.” *Alevy*, 39 N.Y.2d at 332. Accordingly, “[w]here strict scrutiny is required, a painstaking inquiry is made to ensure the existence of a proper governmental objective, and “an examination may be conducted to determine whether less onerous alternatives exist.” *Id.* at 333. “In short, the issue for determination is whether a compelling State interest is necessarily being promoted,” and the “burden imposed on the State is a very heavy one.” *Id.*

Thus, under the strict scrutiny standard applicable in this case, governmental regulation of speech “is enforceable only if it is the least restrictive means for serving a compelling government interest.” *People v. Burwell*, 183 A.D.3d 173, 181 (3d Dep’t 2020) (citing *Town of Delaware v. Leifer*, 34 N.Y.3d 234, 244 (2019)). “The First Amendment requires that the [g]overnment’s chosen restriction on the speech at issue be actually necessary to achieve its interest. There must be a direct causal link between the restriction imposed and the injury to be prevented.” *Id.* (citing *United States v. Alvarez*, 567 U.S. 709 (2012)).

**1. The NRA Sufficiently Alleges That it Was Treated Differently Than Similarly Situated Not-for Profit Organizations.**

The NYAG argues that “[t]he crux of the NRA’s argument is that the OAG has never before sought dissolution of an organization ‘based solely on alleged self-dealing or related-party transactions engaged in by corporate executives,’” which the NYAG contends is false. (NYAG Mem. at 14). But the NYAG immediately turns around and summarizes her Complaint as alleging “decades of wrongdoing by entrenched leadership who corrupted the organization to protect their power and privilege, to the detriment of the organization’s finances, mission and reputation.” (NYAG Mem. at 14). In other words, the NYAG concedes that its allegations concern alleged misconduct by the NRA’s leadership, to the detriment of the Association itself. That is precisely the argument advanced by the NRA in its motion to dismiss the Complaint. (NYSCEF No.371 at 1) (“Even if the allegations against current and former executives are taken as true (as they must be, for purposes of this Motion), the NRA and its Board would be the *victims* of the alleged wrongdoing—not perpetrators. Thus, no provision of New York law justifies punishing the NRA or its members.”).

The NRA alleges, that, to its knowledge, since at least 1999, “the NYAG has never sought dissolution of a non-profit corporation based solely on alleged self-dealing or related-party

transactions engaged in by corporate executives, whether known or unknown to the corporation's board and regardless of whether those transactions were approved and regardless of how substantially those transactions diminished corporate assets.” (Counterclaims at ¶ 38). The Counterclaims then set forth eight separate examples of similarly situated, long-established non-profit corporations that were the victims of alleged self-dealing or even looting by corporate officers, but were not subjected to a dissolution action by the NYAG. (*Id.*, listing NYAG's actions short of dissolution against, *inter alia*, NARAL Pro-Choice, National Arts Club, New York Legal Assistance Group, Metropolitan Council on Jewish Poverty and National Arts Club). As alleged in the Counterclaims, “[i]n every single one of those cases, the NYAG considered the non-profit a *victim* and engaged in collaborative discussions with the organizations to implement measures designed to tighten internal controls,” rather than eliminate the charitable organization altogether. (*Id.*).

Similarly, the Counterclaims allege that New York's highest court has ruled that dissolution is an extreme remedy, which historically has been described by the courts and the NYAG's office to be reserved for non-profits that are a “sham,” a “shell,” or “phony”—none of which has been, or could be, alleged by the NYAG against the NRA. The NRA alleges multiple examples of the NYAG using those terms in discussing dissolution of non-profits engaged in egregious conduct of theft and looting not present here. (Counterclaims at ¶¶ 36-37).

The NYAG further argues that the NYAG's authority to seek dissolution is a well-established statutory power, and that the NRA's pointing out that dissolution is reserved for “sham” non-profits is “not the relevant legal standard.” (NYAG Mem. at 16). The NYAG also notes that it obtained dissolution of the Trump Foundation, despite the fact that it conducted “some legitimate charitable grant making,” as well citing to two additional examples of non-

profits having been dissolved.<sup>7</sup> (*Id.*). None of these arguments are relevant. The NRA does not contend that the word “sham” appears in N-PCL Sections 1101 or 1102, but rather, the NYAG office’s own public statements show that it reserves dissolution of non-profit organizations that were deemed to be a “sham,” a “shell,” or “phony,” which the NYAG nowhere alleges applies to the NRA. Moreover, the NYAG fails to note that the Trump Foundation was prohibited from engaging in political activity but had been alleged to operate for the benefit of a presidential campaign, and that it was already winding down its affairs when it consented to dissolution. (Counterclaims at ¶ 39).

The disparate treatment of the NRA was exposed at the December 10, 2021 hearing on the NRA’s motion to dismiss, when the Court asked the NYAG for examples of the NYAG seeking dissolution in cases similar to that of the NRA:

And do you have any other dissolution cases that you think are similar in the sense, that is, financial malfeasance in an extremely large enterprise where, hypothetically, if you got rid of all the bad actors, why wouldn't the rest of the entity be worth saving?

(December 10, 2021 Transcript, NYSCEF No. 510 at 28:1-5). In response, the NYAG effectively conceded that the NRA has been treated in an unprecedented manner:

Well, your Honor, this case is unique in the size of the entity, the scope and the nature of the wrongdoing, which is really unparalleled in the non-profit sector. And so there is no close analogy that I can point to that I have a case offhand that I can provide.

(*Id.* at 28:6-10).

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<sup>7</sup> The other two examples relied on by the NYAG are not similar to the allegations asserted against the NRA. In *People v. Fed’n of Multicultural Programs*, Index No. 0005671/2015 (Sup. Ct. Albany Cnty.), dissolution of a provider of services to people with disabilities was ordered upon a finding by the court that the corporation was insolvent, unable to discharge its debts and had a receiver appointed to manage its affairs. (*See* NYSCEF No. 276). Likewise, in *People by James v. Northern Leasing Systems, Inc.*, 70 Misc.3d 256, 267 (Sup. Ct. N.Y. Cnty. 2020), the court granted dissolution of a *for-profit corporation* under the BCL upon a finding of “repeated and persistent fraud” and the corporation’s “method of procuring [equipment leases] both is deceptive in itself and has created an enterprise conducive to fraud.” Certainly, no Constitutional issues were at stake.

**2. The NRA Sufficiently Alleges That Its Treatment Is Based on Intent to Inhibit or Punish the Exercise of Constitutional Rights.**

Furthermore, under the strict scrutiny standard applicable here, the NYAG's demand that the NRA be dissolved must be the least restrictive means for serving the government's interest, and the NYAG's selective enforcement shows that it is not. In that regard, at the December 10 hearing, the Court asked whether dissolution is in fact the least restrictive means of remedying the allegations asserted by the NYAG:

THE COURT: Look, the malfeasance is all in one sort of broad category; right? It's sort of this entrenchment and really financial entrenchment, you know, using the organization as a means for enrichment and then bringing in people who are just going to foster that environment, I get that. And, again, this whole point is do we need a trial on this if I accept every horrible thing that's in the complaint. The question is in the exercise of discretion, assuming all of that, can a Court or should a Court find that the appropriate remedy is to essentially get rid of the other parts of the NRA, which are the parts that are not subject to this case. And I'm trying to get a sense for how you balance that when it's a lot of activity that you complain about, but it's all sort of focused in one area, right?

(*Id.* at 27:6-21). The Court continued:

So I think that's the hard question here, because your other relief would address almost everything you just said, right? I mean, if it was done correctly and you got rid of all vestiges of any negatives that you're able to prove, what's the reason to dissolve the entity at that point?

(*Id.* at 31:14-19).

Moreover, while the NYAG asserts, without relevant support, that she is “authorized to seek dissolution in appropriate cases and her decisions are entitled to a presumption of good faith,”<sup>8</sup> (NYAG Mem. at 15), as the Court noted, the NRA's advocacy is protected by the First Amendment and that the remedy demanded by the NYAG must fit the allegations asserted:

[ASSISTANT ATTORNEY GENERAL] CONLEY: Well, the reason we are pursuing dissolution is because the NRA has, under the entrenched leadership that

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<sup>8</sup> The NYAG cites *United States v. Bassford*, 812 F.2d 16, 19 (1st Cir. 1987) for the proposition that her decisions regarding seeking dissolution are “entitled to a presumption of good faith.” However, *Bassford* has nothing to do with the New York dissolution statutes or the NYAG's discretion in that regard.

remains in power, engaged in conduct that violates New York law, and has consistently. And as set forth in the comprehensive complaint, there are just numerous examples of willful disregard of the law and --

THE COURT: By the leadership. In other words, you know, you could argue that this is an otherwise -- you know, perfectly acceptable -- people might disagree on the merit or demerit of various positions taken, but it's a perfectly acceptable First Amendment protected kind of organization. And the question is if you can resolve the concerns, because they're all very much leadership focused, they're not mission focused, and you were very careful in the complaint to do that, but why shouldn't the remedy fit the wrongdoing?

(NYSCEF No. 510 at 31:20-32:9).

The NYAG argues that barring enforcement agencies from investigating “any subject with whom they are alleged to disagree politically would allow subjects to avoid investigation for wrongdoing wholly unrelated to their protected activity.” (NYAG Mem. at 19). Once again, the NYAG mischaracterizes the NRA’s claims. The NRA’s specific claims are based not upon general allegations of “political disagreements,” but upon James’s repeated *threats* to “go after” the NRA, which she described as a “terrorist organization,” before any investigation of the Association had even begun, something her predecessor had resisted doing and about which he warned the NRA. Tellingly, nowhere in the NYAG’s Motion does she even attempt to explain or contextualize James’s threats as alleged in the Counterclaims. That is because no plausible explanation is possible other than James made those threats for political gain, based on the NRA’s advocacy, and then followed up on them.

Similarly, the NYAG makes yet another irrelevant argument that the exercise of her prosecutorial discretion is within her authority. (NYAG Mem. at 19-20). This truism does not answer the NRA’s well-pled allegations that dissolution of the NRA is not the least restrictive means in exercising the NYAG’s authority. Nor does her purported discretion give her license to selectively enforce the law based on the target’s identity and advocacy.



Accordingly, the NYAG's Motion to Dismiss the NRA's Fifth and Sixth Counterclaims should be denied.

**III. The NRA has Standing to Assert a Claim on Behalf of Members for Violation of Their Associational Rights.**

Where, as here, a counterclaim plaintiff is an entity, standing may be established in the organization's representative capacity, based on the injuries to its members, *i.e.* associational standing. See *Pen Am. Ctr., Inc.*, 448 F. Supp. 3d at 319 (quoting *New York Civil Liberties Union v. New York City Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2012)). Here, the NRA has asserted the Third and Fourth Counterclaims based on its members' exercise of association rights, and the NYAG argues the NRA lacks standing to assert such claims based on its members' rights. (NYAG Mem. at 20-22).

To establish standing in a representative capacity, an organizational plaintiff "must show that [1] at least one of its members would have standing to sue, [2] that it is representative of the organizational purposes it asserts and [3] that the case would not require the participation of individual members." *Aristy-Farer v. State*, 143 A.D.3d 101, 111 (1st Dep't 2016) (quoting *New York State Assn. of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 (2004)).

As the NYAG concedes, an organization has standing to assert the rights of its members under section 1983 "if the challenged conduct involves an abridgement of associational rights of 'both the association and [its] members.'" *Aguayo v. Richardson*, 473 F.2d 1090, 1100 (2d Cir. 1973). An associational injury confers standing upon an organization "so long as the challenged [practices] adversely affect its members' associational ties." *Stauber v. City of New York*, 2004 WL 1593870, \*14 (S.D.N.Y. 2004) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)); see also *M.O.C.H.A. Society, Inc. v. City of Buffalo*, 199 F.Supp.2d 40, 46-47 (W.D.N.Y.2002) (association

of African-American firefighters had standing to challenge alleged discriminatory terminations where they would reduce organization's membership and dues).

Here, the NRA has sufficiently alleged an abridgement of associational rights of both the Association and its members. (Counterclaims at ¶¶ 20, 50, 57). As noted above, James's threats against the NRA have caused members and prospective members to fear harassment and retaliation against their family and businesses. (Counterclaims at ¶ 57). Of course, the members' associational rights would be abridged by the elimination of the NRA, which represents and advocates on behalf of its approximately 5 million members. Losing that voice would cause the NRA's members irreversible harm. Indeed, as the Court pointed out at the December 10 hearing, the rights of the NRA's members must be considered in considering dissolution, and NRA members have sought intervention to oppose dissolution. (NYSCEF No. 510 at 29:19-30:3, 30:15-21).

Finally, the NYAG relies upon a November 19, 2020 letter to the Court from the NRA objecting to a letter purportedly on behalf of "several members" of the NRA seeking to intervene in this action. (NYAG Mem. at 22, citing NYSCEF No. 177). However, as stated in the NRA's letter, those unnamed members lacked derivative standing under NPCL § 623(a), requiring a member to obtain the support of five percent of a class of members within the NRA's membership. The NRA took the same position with regard to the motions to intervene filed in this action. (*See* NYSCEF Nos. 300 at 3-4 and 407 at 9). Thus, an NRA member could have standing to assert derivative claims against the NYAG if she could attain the threshold requirements of NPCL § 623(a) and the other requirements, such as NPCL § 623(c), which requires a member to make a demand on the NRA's Board of Directors.

Nonetheless, while a member could have standing to assert derivative claims against the NYAG, the counterclaims asserted by the NRA against the NYAG do not require the participation of individual members. *See Rodden v. Axelrod*, 79 A.D.2d 29, 32 (3d Dep't 1981) (trade association had standing to represent its members' common interests which were affected by the actions of the Commissioner of Health).<sup>9</sup>

**IV. A Decision on the NRA's Seventh Counterclaim for a Declaratory Judgment that Not-For-Profit Law Sections 1101 or 1102 are Unconstitutional as Applied is Premature.**

In order to determine whether a statute is unconstitutional as applied to a party, the record must be "fully developed concerning the precise scope of [the party's] activities." *Klepper v. Christian Coalition of New York Inc.*, 259 A.D.2d 926, 928 (3d Dep't 1999) (holding on a motion for summary judgment that "it would be premature to rule upon whether the statute is unconstitutional as applied"). Thus, where "there has been limited, if non-existent, discovery on this issue," a party "should be given the opportunity to develop a record which establishes, actually, rather than theoretically," its as-applied constitutional claim. *Amazon.com, LLC v. New York State Dept. of Taxation and Finance*, 81 A.D.3d 183, 188, 203 (1st Dep't 2010) ("Since we find that there are issues of fact concerning some of the as-applied challenges raised by plaintiffs to the statute, we conclude that the dismissal of the entire complaint was premature.").

Here, there has been no discovery on the NRA's Counterclaims. The NYAG has in fact resisted even beginning such discovery. (NYSCEF No. 511 at 32:16-33:1). Accordingly, as a

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<sup>9</sup> Contrary to the NYAG's argument, Counterclaims Two and Four, asserted under Article I, Sections 8 and 9 of the New York State Constitution, are not duplicative of Counterclaims One and Three brought under 42 U.S.C. § 1983. (NYAG Mem. at 25-26). The NYAG argues that such State Constitutional claims must otherwise be unavailable at common law or under § 1983. At the same time, the NYAG argues that associational standing for the NRA is unavailable for Counterclaims Three, under § 1983. Thus, the NYAG is arguing that a remedy is unavailable to the NRA under Counterclaim Three. Therefore, under the NYAG's own argument, Counterclaims Three and Four are not duplicative.

matter of law, any determination of the NRA's as-applied challenge is premature, and the NYAG's Motion to Dismiss must be denied.

**V. The Attorney General Is Not Entitled to Absolute or Qualified Immunity.**

**A. The Attorney General is Not Entitled to Absolute Immunity**

“The entitlement of a prosecutor to absolute immunity from a claim for damages against him in his individual capacity on account of his official actions depends principally on the nature of the function performed, not on the office itself.” *Rodrigues v. City of New York*, 193 A.D.2d 79, 85 (1st Dep’t 1993). Where the prosecutorial activities are “‘intimately associated with the judicial phase of the criminal process,’ e.g., the ‘initiat[ion of] a prosecution,’ the prosecutor is entitled to absolute immunity from liability under section 1983.” *Id.* However, prosecutorial activities that are characterized as administrative or investigative are entitled only to qualified immunity. *Id.*; *see also Claude H. v. County of Oneida*, 214 A.D.2d 964, 965 (4th Dep’t 1995) (“Where a prosecutor goes outside his quasi-judicial role, however, and acts as an investigator or police officer, he is entitled only to qualified immunity”); *Cunningham v. State*, 71 A.D.2d 181, 183 (3d Dep’t 1979) (“absolute immunity ceases to exist when a prosecuting attorney is engaged in a role other than quasijudicial”). Further, absolute immunity is available only for “acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of [his or her] role as an advocate for the State.” *Sculti v. Finley*, 167 A.D.3d 796, 797 (2d Dep’t 2018).<sup>10</sup>

Thus, prior to a “formal legal proceeding” being initiated, officials’ conduct is deemed to be investigative, and absolute immunity is not available. *Hill v. City of New York*, 45 F.3d 653,

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<sup>10</sup> Absolute immunity has been extended beyond prosecutors to government officials in civil administrative enforcement proceedings when such officials “performed functions analogous to those of a prosecutor.” *Dobosz v. Walsh*, 892 F.2d 1135, 1139 (2d Cir. 1989).

661 (2d Cir. 1995); *see also Norton v. Town of Brookhaven*, 33 F. Supp. 3d 215, 230-31 (E.D.N.Y. 2014) (denying absolute immunity for municipal attorney with respect to investigative work prior to the filing of the formal complaint, including encouraging another defendant, an inspector for the housing department, to file a formal complaint alleging permit violations); *Peters v. City of Buffalo*, 848 F. Supp. 2d 378, 386 (W.D.N.Y. 2012) (“Actions taken prior to the start of a formal legal proceeding are not entitled to absolute immunity because prior to the start of such a formal proceeding, the prosecutor has not stepped into his role as an advocate.”). Nor does “the mere fact that a . . . later [proceeding is] convene[d] . . . automatically serve to cloak . . . prior investigatory actions with the protection of absolute immunity.” *See Anilao v. Spota*, 2018 WL 6190519, \*16 (E.D.N.Y. Nov. 28, 2018).

It is the burden of the defendant to show that absolute immunity is warranted. *Chetrick v. Cohen*, 305 A.D.2d 359, 361 (2d Dep’t 2003) (officials not entitled to absolute immunity “for official actions taken by them under any and all circumstances, and at all times,” and summary judgment denied based on absolute immunity when the allegations in the complaint were not merely conclusory, as here).

Finally, absolute or qualified immunity applies only to claims for damages, not injunctive or declaratory relief. *Felder v. Foster*, 71 A.D.2d 71, 75 (4th Dep’t 1979); *see also Adler v. Pataki*, 185 F.3d 35 (2d Cir. 1999) (“Qualified immunity shields the defendants only from claims for monetary damages and does not bar actions for declaratory or injunctive relief.”).

The NYAG has failed to meet her burden that she is entitled to absolute immunity.

First, absolute immunity would apply only to the NRA’s claims for monetary damages against James in her individual capacity, but does not apply to the NRA’s claims for declaratory relief. (*See Counterclaims at ¶¶ 71, 84, 95, 104, 114, 126, 136*).

Second, absolute immunity would only apply to activities associated with the “judicial phase.” Here, as detailed above, the gravamen of the Counterclaims is that James repeatedly threatened the NRA *prior* to her assuming office, and then once in office, subjected the NRA to retaliation and selective enforcement by virtue of the pretextual investigation prior to commencement of this dissolution proceeding. James functioned in an administrative position, driving the effort to fulfill her campaign threats through the use of the Office of the Attorney General.<sup>11</sup> Accordingly, the law does not afford James absolute immunity.

**B. The Attorney General Is Not Entitled to Qualified Immunity**

A public official is entitled to qualified immunity under § 1983 if “either (1) their conduct did not violate clearly established rights of which a reasonable person would have known, or (2) it was objectively reasonable [for them] to believe that their acts did not violate these clearly established rights.” *Marquez v. Hoffman*, 2021 WL 1226981, \*17 (S.D.N.Y. 2021) (quoting *Cornejo v. Bell*, 592 F.3d 121, 128 (2d Cir. 2010)). Whether an official’s conduct was “objectively reasonable” requires “examination of the information that Defendants had at that time, ‘without consideration of subjective intent.’” *Id.* Although dismissal may be sought on this ground, it “faces a formidable hurdle when advanced on such a motion.” *Id.* (quoting *McKenna v. Wright*, 386 F.3d 432, 434 (2d Cir. 2004)); *Bernstein v. City of N.Y.*, 2007 WL 1573910, \*9 (S.D.N.Y. May 24, 2007) (“Because the qualified immunity defense necessarily involves a fact-specific inquiry, ‘[i]t is generally premature to address the defense of qualified immunity in a motion to dismiss.’”).

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<sup>11</sup> The NYAG’s reliance on *National Rifle Association of America v. Cuomo*, is misplaced. There, the court ruled that the defendant Vullo, former Superintendent of the New York Department of Financial Services, was entitled to absolute immunity for her decision to enter into certain consent orders, and her decision not to bring charges against certain regulated entities. 525 F.Supp.3d 382, 394 (N.D.N.Y.2021). The court held, however, that a government official is not entitled to absolute immunity when functioning in “an administrative or investigative capacity,” as is alleged here with James, where the Counterclaims allege that James directly threatened the NRA with retaliation both before and after assuming office, and fulfilled those threats upon entering office. *Id.* More relevant to the facts here, the *Cuomo* court *denied* qualified immunity to Vullo, on the grounds of her “implied threats” to regulated entities if they did not disassociate with the NRA. *Id.* at 403.

The defense must be “based on facts appearing on the face of the complaint” and “is subject to the more ‘stringent standard’ applicable to motions for summary judgment.” *Id.* Thus, the Court must draw “all reasonable inferences from the facts alleged, not only those that support his claim, but also those that defeat the immunity defense.” *Id.* Thus, a motion to dismiss on a qualified immunity basis “may be granted only where it appears *beyond doubt that the plaintiff can prove no set of facts in support of [her] claim that would entitle [her] to relief.*” *Id.* (emphasis added) (quoting *Citibank, N.A. v. K-H Corp.*, 968 F.2d 1489, 1494 (2d Cir. 1992)); *see also Stipo v. Town of North Castle*, 205 A.D.2d 608, 608-609 (2d Dep’t 1994) (affirming denial of motion to dismiss when “qualified immunity cannot be resolved on the present record and must await discovery or, if necessary, a plenary trial”); *Sculti*, 167 A.D.3d at 797-798 (“viewing the allegations in the complaint in the light most favorable to the plaintiffs, the complaint stated a cause of action based upon [defendant’s] conduct in connection with obtaining the search warrant” and “[w]e cannot say at this stage of the action whether [defendant] is entitled to qualified immunity”).<sup>12</sup>

In any case, Attorney General James cannot invoke qualified immunity with respect to violations of clearly established constitutional law. Thus, a government official “is entitled to qualified immunity from suit for actions taken as a government official if (1) the conduct attributed to the official is not prohibited by federal law, constitutional or otherwise; (2) the plaintiff’s right not to be subjected to such conduct by the official was not clearly established at the time of the conduct; or (3) the official’s action was objectively legally reasonable in light of the legal rules that were clearly established at the time it was taken.” *Cuoco v. Moritsugu*, 222 F.3d 99, 109 (2d Cir. 2000); *see also Acquest Wehrle, LLC v. Town of Amherst*, 129 A.D.3d 1644, 1649 (4th Dep’t

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<sup>12</sup> *See also Torres v. Faxton St. Lukes Healthcare*, 2017 WL 11317906, \*2 (N.D.N.Y. Jan. 26, 2017) (a defendant seeking qualified immunity at the motion to dismiss stage “‘will generally face a difficult road’ because a pre-answer challenge to the pleadings is necessarily confined to a consideration of a plaintiff’s yet-untested factual allegations, which are often egregious”) (quoting *Garcia v. Does*, 779 F.3d 84, 97 (2d Cir. 2015)).

2015) (“A government official is entitled to qualified immunity provided his or her conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”); *Sonne*, 67 A.D.3d at 206 (qualified immunity applies if government officials’ conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”). In that regard, it is “clearly established that selective enforcement of a facially valid law based on an official’s dislike of protected expression is unlawful.” *Burns v. Citarella*, 443 F. Supp. 2d 464, 470 (S.D.N.Y. 2006); *Massi v. Flynn*, 254 F. App’x 84, 87 (2d Cir. 2007) (“no dispute” that the constitutional right to be free from selective treatment is clearly established); *Grant v. Thomas*, 2019 WL 2176302, \*4 (S.D.N.Y. 2019) (First Amendment right to free association was clearly established).

The NYAG has failed to carry her burden that she is entitled to qualified immunity.

First, a finding of qualified immunity is premature at this motion to dismiss stage. There has been no discovery regarding the NRA’s Counterclaims, much less can the NYAG establish *beyond doubt* that the NRA can prove no set of facts in support of its Counterclaims. The Motion to Dismiss on the ground of qualified immunity should be denied on this basis alone.

Second, the NYAG cannot invoke qualified immunity for violations of clearly established constitutional law. Here, the NYAG argues, in conclusory fashion, that it “was objectively reasonable for [her] to commence an investigation and a civil action against the NRA without concern that such action would violate a clearly established right.” (NYAG Mem. at 28). Once again, the NYAG misses the point. The NRA alleges that James’s actions as NYAG, including commencing the investigation, were undertaken directly in response to and substantially motivated by the NRA’s political speech in support of the Second Amendment and to eliminate a political enemy, as had been threatened repeatedly by James both before and after she was elected. James



acted with the intent to retaliate against the NRA’s core political speech, which, even the NYAG does not contest, is protected by the First Amendment. It is clearly established that such retaliation and selective enforcement violates the U.S. and New York State Constitutions. *Massi* 254 F. App’x at 87; *Burns*, 443 F. Supp. at 470; *Grant*, 2019 WL 2176302, at \*4.

Finally, as a matter of law, it was not objectively reasonable for James to believe that retaliating against the NRA based on its political speech and to eliminate her political enemy does not violate the NRA’s and its members’ clearly established rights. *Acquest Wehrle, LLC*, 129 A.D.3d at 1649 (holding it was not objectively reasonable for defendant to believe that its conduct in withdrawing a waiver request was appropriate when it was done violation of plaintiff’s constitutional rights); *Grant*, 2019 WL 2176302 at \*4 (plaintiff sufficiently alleged defendants violated his First Amendment rights, “and it was not objectively reasonable for defendants to believe they could lawfully violate those rights . . . dismissing plaintiff’s First Amendment claim at [motion to dismiss] stage is inappropriate”).

**CONCLUSION**

For all the foregoing reasons, Defendant-Counterclaim Plaintiff National Rifle Association respectfully requests that the New York Attorney General's Motion to Dismiss be denied in its entirety.

Dated: January 10, 2022

Respectfully submitted,

By: /s/ William A. Brewer III

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**Certification of Compliance with Word Count**

I, Mordecai Geisler, 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 to the motion to dismiss the NRA's Counterclaims, complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)), and with this Court's Order dated June 22, 2021 (NYSCEF No. 262) increasing the word limit to 9,500 words, because the memorandum of law contains 9,441 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/ Mordecai Geisler  
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*National Rifle Association of America*