To be Argued by:
NOAH PETERS
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

PEOPLE OF THE STATE OF NEW YORK, by Letitia James,
Attorney General of the State of New York,

Plaintiff-Respondent,

– against –

THE NATIONAL RIFLE ASSOCIATION OF AMERICA,

Defendant-Appellant,

– and –

WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER
and JOSHUA POWELL,

Defendants.

Appellate Case No.: 2022-03159

BRIEF FOR DEFENDANT-APPELLANT

WILLIAM A. BREWER III
SVETLANA M. EISENBERG
NOAH PETERS
BREWER, ATTORNEYS & COUNSELORS
750 Lexington Avenue, 14th Floor
New York, New York 10022
(212) 489-1400
wab@brewerattorneys.com
sme@brewerattorneys.com
nbp@brewerattorneys.com

Attorneys for Defendant-Appellant

New York County Clerk's Index No. 451625/20

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PRELIMINARY STATEMENT

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[1] The U.S. and New York Constitutions bar the government from applying or enforcing a valid law "with an evil eye and an unequal hand."[2] Discriminatory enforcement of the law with the intent to adversely affect a speaker's political advocacy violates the First Amendment.[3]

Here, the New York Attorney General ("NYAG" or "James") announced her intent to take adverse action against the National Rifle Association of America ("NRA" or "Association") because she dislikes its political advocacy. She called the NRA "a terrorist organization" and a "criminal enterprise" and condemned its speech as "poisonous" and "deadly propaganda."[4] Importantly, in campaigning for the office she holds, she vowed to use her "power as attorney general" to "take down the NRA."[5]

Having promised to take immediate, adverse action against the NRA, she

---

[1] *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).
[2] *See Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886).
[3] *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985); *Hoye v. City of Oakland*, 653 F.3d 835, 854 (9th Cir. 2011).
[4] R. Vol. 1 at 74.141 (The NRA's Amended Verified Answer and Counterclaims, beginning in the Record on Appeal at 74.1).
[5] *Id*.

followed through on her threats. Upon assuming office, James brought an action to dissolve the NRA and seize its assets on grounds that had never before served as a basis for such an action.[6] James's actions drew widespread condemnation as a blatant abuse of power and a threat to democracy from both sides of the political divide, including the American Civil Liberties Union (ACLU), a writer with *The New Republic*, and other voices not traditionally aligned with the NRA.[7]

Transparently motivated by her antipathy for the Association's political advocacy, James's conduct violated the U.S. and New York Constitutions. A public official cannot use her government power to take adverse action to punish a speaker for its advocacy. The New York Supreme Court (the "lower court") below makes several fundamental errors in holding otherwise and dismissing the NRA's constitutional counterclaims.

First, the lower court incorrectly dismisses the NRA's claims for injunctive and declaratory relief as "moot" because it previously dismissed the NYAG's requested remedy of dissolution.[8] However, the New York Court of Appeals has

[6] *Id*. at 74.152–61; *see also* the NYAG's Verified Complaint (NYSCEF Doc No. 1), dated August 6, 2018, at p. 141 (seeking the NRA's dissolution, seizure of its assets, and application of those assets to "charitable uses.").
[7] *Id*. at 74.158.
[8] R. Vol. 1 at 7 (The Hon. Joel M. Cohen's Decision and Order on Motion dated June 10, 2022, beginning in the Record on Appeal at 3). In place of its dissolution claims, the NYAG is now seeking "an independent compliance monitor with responsibility to report to the Attorney General and the Court" in place of original request for total dissolution and asset seizure. (NYSCEF Doc No. 646 at 175).

made clear that, where a discriminatory motive taints the entire enforcement action, the proper remedy is dismissal of the action in its entirety.[9] Federal law confirms that the unlawfulness of a civil enforcement action brought for unconstitutional reasons cannot be "cleansed" of this taint by subsequent remedial measures that stop short of dismissal. [10] "The court may not permit vindictiveness to be hidden behind procedural cosmetics."[11] But that is precisely what the lower court does: it holds that its dismissal of the NYAG's outrageously improper requests for dissolution and asset-seizure somehow cures the NYAG's unconstitutional motive in bringing suit.

Second, the lower court wrongly assumes that the NYAG enjoyed absolute immunity from suits seeking declaratory and injunctive relief. That proposition is wrong—a prosecutor's "entitlement to absolute immunity from a claim for damages . . . does not bar the granting of injunctive relief, or of other equitable relief."[12] Thus, to the extent that the decision below assumes that absolute immunity means that "the remaining portions of the [NRA's] counterclaims focus primarily on her decision to investigate the NRA following her public comments denouncing the organization,"

---

[9] *303 W. 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 694 (1979).
[10] *Locurto v. Safir*, 264 F.3d 154, 169 (2d Cir. 2001) ("[I]t can never be objectively reasonable for a government official to act with the intent that is prohibited by law."); *Nat'l Council of Arab Americans, Act Now to Stop War & End Racism Coal. v. City of New York*, 478 F. Supp. 2d 480, 491 (S.D.N.Y. 2007).
[11] *Id*. (emphasis added).
[12] *Shmueli v. City of New York*, 424 F.3d 231, 239 (2d Cir. 2005); *see also Pulliam v. Allen*, 466 U.S. 522, 536–37 (1984); *Singleton v. Cannizzaro*, 956 F.3d 773, 778 n. 3 (5th Cir. 2020) ("Absolute and qualified immunity protect only *individuals* from claims for *damages*; they do not bar official-capacity claims or claims for injunctive relief.").

it errs and reversal is necessary.[13] The NRA's counterclaims encompass all of the adverse uses of James's governmental power—both the investigation and the subsequent enforcement action. [14] Precedent makes clear that the lower court has no proper basis for separating them.

Third, the lower court requires that, to establish causation regarding its First Amendment retaliation claim, there could be no probable cause whatsoever for the NYAG's investigation or subsequent civil lawsuit.[15] But that standard does not apply where the government official admits her retaliatory animus and desire to use her government power to suppress a speaker's advocacy.[16] Here, the NYAG repeatedly proclaimed that she would "eliminate" the NRA given her antipathy for its viewpoint.[17] Under settled law, that is direct evidence of retaliatory animus, which obviates the need for any additional showing of causation.[18]

The decision below misapplies the pertinent standards of review and relies on

---

[13] R. Vol. 1 at 8.

[14] *Id.* at 74.179 (seeking dismissal of "this action in its entirety," not the dismissal of specific remedies), 74.141–47 (charging that the investigation and the subsequent lawsuit were both motivated by an unconstitutional purpose).

[15] *Id.* at 9.

[16] *Lozman v. City of Riviera Beach, Fla.,* 138 S. Ct. 1945, 1954 (2018) (*Hartman*'s "no probable cause" standard did not apply where the plaintiff "allege[d] that the City, through its legislators, formed a premeditated plan to intimidate him in retaliation for his criticisms of city officials and his open-meetings lawsuit.").

[17] R. Vol. 1 at 74.144.

[18] *See*, *e.g.*, *Brown v. E. Mississippi Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993) ("When a plaintiff presents credible direct evidence that discriminatory animus in part motivated or was a substantial factor in the [adverse] action, the burden of proof shifts to the employer to establish by a preponderance of the evidence that the same decision would have been made regardless of the forbidden factor.").

inapplicable case law to force the NRA to carry an impossible burden—proving that the NYAG meant what she said, without reference to the fact that she said it.[19] In so doing, the lower court creates a virtually irrefutable presumption that government officials act in good-faith even where they openly declare their retaliatory intent.

The "no probable cause" standard does not apply in civil cases. The lower court imports that standard from two U.S. Supreme Court cases that involved First Amendment retaliation claims in the criminal context—retaliatory prosecution[20] and retaliatory arrest.[21] Both cases, however, make clear that the circumstances inherent in the criminal context are the basis for imposing a "no probable cause" requirement.

Hartman's analysis cabined its additional "no probable cause" requirement to "[w]hen the claimed retaliation for protected conduct is a criminal charge."[22] This analysis does not apply in the case of a non-criminal matter such as this one. No heightened standard is needed to shield the exercise of a government official's ordinary civil or regulatory power.[23]

Nieves imported the "no probable cause" standard into the analysis of retaliatory arrest claims because "[o]fficers frequently must make split-second judgments when deciding whether to arrest, and the content and manner of a

[19] *See id.* at 10–11.
[20] *Hartman v. Moore*, 547 U.S. 250 (2006).
[21] *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019).
[22] *Hartman*, 547 U.S. at 260.
[23] *See CarePartners, LLC v. Lashway*, 545 F.3d 867, 877 n. 7 (9th Cir. 2008).

suspect's speech may convey vital information—for example, if he is ready to cooperate or rather presents a continuing threat."[24] That analysis does not apply to a civil enforcement action, which does not involve split-second judgments.[25]

Moreover, the U.S. Supreme Court made clear that, in non-criminal First Amendment retaliation cases relying on indirect evidence of causation, the standard of *Mt. Healthy City Bd. of Ed. v. Doyle*[26]—not *Hartman* or *Nieves*—applies.[27] Under *Mt. Healthy*, once a plaintiff shows that First Amendment-protected conduct was a "substantial factor" in the allegedly retaliatory government action, the burden shifts to the government to show "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct."[28] In cases like this one, requiring "proof of improper motive" but outside the criminal context, the Supreme Court has rejected crafting special rules "for such cases to protect public servants from the burdens of trial and discovery," and affirmed that the causation standard of *Mt. Healthy* applies.[29]

So too, the Second Circuit has expressly held that the *Mt. Healthy* causation standard applies in First Amendment retaliation claims based on allegedly retaliatory

---

[24] *Nieves*, 39 S. Ct. at 1724.
[25] *Id*.
[26] 429 U.S. 274 (1977).
[27] *See Lozman*, 138 S. Ct. at 1952 (observing that *Hartman*'s "no probable cause" standard only applies "in the criminal sphere" and that *Mt. Healthy* applies in the civil context).
[28] *Mt. Healthy*, 429 U.S. at 287.
[29] *Crawford-El v. Britton*, 523 U.S. 574, 577–78, 593 (1998).

civil lawsuits.[30] And it has held that causation under such circumstances is a question for the jury, not one that can be determined as a matter of law.[31]

Where, as here, a plaintiff pleads facts plausibly showing that the government acted with a retaliatory motive, the burden shifts to the government to show that it would have taken the same action absent the unlawful motive.[32] Under such circumstances, the government—not the plaintiff—carries the burden of proving the genuineness of the government's proffered non-retaliatory justification for its actions.[33]

In sum, once the plaintiff makes a *prima facie* case, as the NRA has done here, the genuineness of the government's stated non-retaliatory justification is a question of fact for the jury to determine.[34] "Indeed, any other conception of the law would amount to a green light to government officers to intentionally discriminate based on content, so long as those officers could later conceive of any pretextual content-neutral reason for their having acted that way."[35]

Fourth, the NRA plausibly alleged official actions taken by James that were expressly motivated by her antipathy for the NRA and its political views. James's

---

[30] *Greenwich Citizens Comm., Inc. v. Ctys. of Warren & Washington Indus. Dev. Agency*, 77 F.3d 26, 31 (2d Cir. 1996) (citing *Mt. Healthy*, 429 U.S. at 287).
[31] *Id*.
[32] *Smith v. County of Suffolk*, 776 F.3d 114, 121–22 (2nd Cir. 2015).
[33] *Mt. Healthy*, 429 U.S. at 287.
[34] *Natl Council of Arab Americans*, 478 F. Supp. 2d at 491 (collecting cases).
[35] *Nicholas v. Bratton*, 376 F. Supp. 3d 232, 277 (S.D.N.Y. 2019).

promises as a candidate to pursue the NRA were not made idly or in isolation. Then-Governor Andrew Cuomo also boasted that New York would use its regulatory power to force the NRA into financial jeopardy.[36] As part of New York's coordinated effort to retaliate against the NRA for its advocacy, James promised to take adverse action against the Association before she had any reason to do so—other than her antipathy for its First Amendment-protected advocacy. Then, when James became Attorney General, she sought to dissolve the Association and seize its assets (among other remedies), citing the misconduct a handful of individuals who allegedly took advantage of the NRA.[37]

Under settled law, plausible allegations of an official policy of retaliation against a disfavored speaker constitute a cognizable claim under the First Amendment. As the U.S. Supreme Court explained, "An official retaliatory policy is a particularly troubling and potent form of retaliation, for a policy can be long term and pervasive, unlike an ad hoc, on-the-spot decision by an individual officer."[38] Put simply, "when retaliation against protected speech is elevated to the level of official policy, there is a compelling need for adequate avenues of redress."[39]

---

[36] R. Vol. 1 at 74.144–45.
[37] *Id*. at 74.143.
[38] *Lozman*, 138 S. Ct. at 195.
[39] *Id*.

Here, the NRA pleads that the official policy of the State of New York is to crush the NRA for its gun rights advocacy—it has sought to dissolve the NRA, seize its assets, and cut off its financial resources by illegally pressuring financial institutions to blacklist it.[40] James, ex-Governor Cuomo, and other high-ranking New York officials have openly proclaimed that they sought to bankrupt the NRA in retaliation for its First Amendment-protected gun rights advocacy.[41] The NYAG's lawsuit thus "presents an unusual, perhaps unique confluence of factors: substantial evidence of an extensive government campaign, of which this [action] is only a part, designed to use the burden of repeated [regulatory actions] to chill the exercise of First Amendment rights."[42] In dismissing the NRA's counterclaims for First Amendment retaliation, the decision below fails to consider the Answer's allegations that the NRA was the victim of an official policy of retaliation.

Finally, the lower court errs in dismissing the NRA's selective enforcement counterclaims. Despite the NRA's well-pleaded allegations of disparate treatment and the NYAG's admissions of discriminatory intent, the opinion below protects the NYAG behind a presumption of legitimacy and offhandedly dismisses the NRA's well-pleaded allegations of disparate treatment.[43]

---

[40] R. Vol. 1 at 74.144–48.
[41] *Id*. at 74.141–42, 74.144–45.
[42] *United States v. P.H.E., Inc*., 965 F.2d 848, 855 (10th Cir. 1992).
[43] R. Vol. 1 at 14–16.

The decision below incorrectly ignores James's open boasting that she was motivated by impermissible considerations—that is, the NRA's gun rights advocacy, which she despises—in bringing this action.[44] Indeed, the lower court's opinion practically draws a roadmap for how officials can abuse state power to destroy the ability for non-profits to advocate for positions disfavored by the government. An official can run for office with the stated aim of taking adverse action to a silence a disfavored speaker. The official may then follow through on her threats to abuse her office, initiating an onerous, and expensive civil-enforcement action that has the intent and effect of consuming the speaker's assets and resources. The Answer pleads just this situation.[45] Under the lower court's decision, so long as the targeted entity has committed any technical infraction whatsoever, it would have no redress for the blatant violation of its First Amendment rights.[46] This would mark a decisive and dangerous break with both federal[47] and New York[48] law.

Because the decision below disregards the NRA's well-pleaded allegations and misapplies legal standards, it should be reversed and remanded.

---

[44] *See id.*
[45] R. Vol. 1 at 74.7-9; 74.144–51, 74.170.
[46] *Id*. at 9.
[47] *P.H.E., Inc*., 965 F.2d at 854 (recognizing "the First Amendment right to be free from pretextual criminal prosecutions, brought not by a desire to enforce the law, but by a desire to pressure a defendant into surrendering First Amendment rights").
[48] *303 W. 42nd St. Corp.*, 46 N.Y.2d at 694.

QUESTIONS PRESENTED

1. Does a court's dismissal of certain remedies moot claims for injunctive and declaratory relief, where those claims rest on allegations that the lawsuit's filing was motivated in its entirety by a desire to retaliate against a disfavored speaker?

The court below answered this question in the affirmative.

2. Does a state attorney enjoy absolute prosecutorial immunity even from claims for declaratory and injunctive relief?

The court below answered this question in the affirmative.

3. Where a plaintiff asserting First Amendment retaliation offers direct evidence of a government official's retaliatory intent in filing a civil lawsuit, must the plaintiff also allege that there was no probable cause for the lawsuit?

The court below answered this question in the affirmative.

STATEMENT OF RELEVANT FACTS

The NRA is America's leading provider of marksmanship and gun safety education for the military, law enforcement, and civilians. It is also the foremost defender of the Second Amendment to the United States Constitution.[49]

In recent years, the NRA's corporate domicile—New York—has seen government officials use their governmental powers to pursue a concerted campaign to punish the NRA for its Second Amendment advocacy.[50]

[49] R. Vol. 1 at 74.140.
[50] *See generally id*. at 74.141–48.

As a candidate for NYAG, Letitia James branded the NRA "a terrorist organization" and a "criminal enterprise" and labeled its speech "poisonous" and "deadly propaganda."[51] She vowed that, if elected, she would use her "power as attorney general" to "take down the NRA."[52] She vowed to leverage her "power as an attorney general to regulate charities" in order to instigate a fishing expedition into the NRA's "legitimacy . . . to see whether or not they have in fact complied with the not-for-profit law in the State of New York."[53] Her promise to "take down" the NRA was motivated by her antipathy for the NRA's political speech.[54] James further vowed that financial institutions and donors linked to the NRA would be pursued by law enforcement—akin to supporters of Al Qaeda or the mafia.[55]

Once elected, James made good on her promises. The NYAG launched an investigation into the NRA, searching for a pretext upon which to dissolve it.[56] Despite meager results, she initiated a civil lawsuit which sought, *inter alia*, to dissolve the NRA and seize its assets.

The NYAG's pretextual basis for her dissolution lawsuit against the NRA is evident in her own words. In an August 6, 2020 press conference, the NYAG repeatedly misstated the facts of the matter, struggled to identify who at the NRA

[51] *Id*. at 74.141.
[52] *Id.*
[53] *Id*.
[54] *Id.*
[55] *Id*.
[56] *Id*. at 74.146–48.

she believed engaged in misconduct, and was unable to justify her pursuit of dissolution of an organization lawfully organized which employed hundreds of individuals lawfully pursuing programs which served the interests of its millions of members and supporters.[57] So obviously political in its motivation was the NYAG's dissolution lawsuit that it caused an immediate outcry across the political spectrum as an abusive and unconstitutional action.[58]

In its lawsuit, the NYAG sought to destroy an organization of five million members and seize all of its asserts based solely on allegations of misconduct by four individual executives, two of whom no longer work at the NRA, and one of whom was fired by the NRA for many of the same issues alleged in the Complaint.[59] But dissolution is reserved for cases where the misconduct goes far beyond what the NYAG alleges. [60]

Based on the NYAG's actions taken against the NRA on account of its political speech, the NRA brings: (1) a § 1983 First Amendment Retaliation claim; (2) an Article I Section 8 New York Constitution Retaliation claim;[61] (3) a § 1983 First and Fourteenth Amendments Retaliation claim, invoking its members' associational rights; and (4) an Article I Section 9 New York Constitution Retaliation

[57] *Id.* at 74.157 n. 60.
[58] *Id.* at 74.6, nn. 3–5.
[59] *Id*. at 74.143.
[60] *See Liebert v. Clapp*, 13 N.Y.2d 313, 316 (1963); *see also* R. Vol. 1 at 74.152–61.
[61] N.Y. CONST. art. I, § 8.

claim, also invoking its members' associational rights.[62]

Regarding the NYAG's disparate treatment of the NRA, the NRA brings (5) a Fourteenth Amendment Equal Protection claim; and (6) an Article I Section 11 New York Constitution Selective Enforcement claim.[63]

The lower court's June 10, 2022 decision grants the NYAG's motion to dismiss the NRA's counterclaims. With respect to the NRA's First, Second, Third, and Fourth Counterclaims, the lower court rules that the NRA failed to prove a causal link between James's clearly stated animus against the NRA and her dissolution action against it.[64] This despite the NRA's comprehensive pleading of the timeline of the NYAG's statements and actions and her clear retaliatory threats.[65]

Here, the NYAG repeatedly announced her intention to destroy the NRA based on disagreement with its viewpoint.[66] The lower court, however, dismisses any link with the circular reasoning that "as evidence of personal animus, her campaign-trail rhetoric is relevant only if the NRA alleges a sufficient causal link between the animus and the adverse action, which it has not."[67] But the NRA cites James's own statements admitting a causal link as proof of the causal link.[68]

---

[62] N.Y. CONST. art. I, § 9.
[63] N.Y. CONST. art. I, § 11.
[64] R. Vol. 1 at 9.
[65] *See generally id*. at 74.140–182.
[66] *Id.* at 74.141–43.
[67] *Id.* at 11.
[68] *Id.* at 74.146.

The lower court further holds that the NRA bore an unprecedented burden to prove the NYAG's belief in its own statements and disprove that her suit had any lawful basis.[69]

With respect to the NRA's Fifth and Sixth Counterclaims for selective enforcement in violation of the constitutional right to equal protection, the lower court erroneously finds that "[t]he counterclaims also fail to allege that the NRA was treated differently from similarly situated charitable organizations due to impermissible considerations."[70] The decision below ignores the NRA's detailed allegations that the NYAG had repeatedly failed to seek dissolution against non-profit entities whose executives engaged in far more wide-reaching misconduct than the NRA's, and that the most logical difference was the NYAG's avowed animus towards the NRA and her repeated pledges to dissolve the NRA in retaliation for its advocacy.[71]

ARGUMENT

I. STANDARD OF REVIEW

The Appellate Division "review[s] questions of law and questions of fact on appeal from a judgment or order of a court of original instance."[72] When reviewing an order granting dismissal under CPLR 3211(a)(7), the court must "accept the facts

[69] *See id.* at 8–10.
[70] R. Vol. 1 at 16.
[71] *Id.* at 16, 74.146–48.
[72] CPLR 5501.

alleged in the pleading as true and accord the opponent of the motion . . . 'the benefit of every possible favorable inference [to] determine only whether the facts as alleged fit within any cognizable legal theory.'"[73] The pleadings are to be liberally construed, and the motion is properly denied "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law."[74]

An issue not raised at the trial level may be raised on appeal if it is legal in nature and does not rely on facts outside the record.[75]

II. THE LOWER COURT INCORRECTLY HOLDS THAT THE NRA'S CLAIMS FOR INJUNCTIVE AND DECLARATORY RELIEF ARE MOOT OR BARRED BY PROSECUTORIAL IMMUNITY

As an initial matter, the lower court incorrectly dismisses the NRA's claims for injunctive and declaratory relief as "moot" simply because it previously dismissed the NYAG's dissolution remedy. And it wrongly holds that the NYAG enjoyed absolute immunity from suits seeking declaratory and injunctive relief.

The decision below claims that "the scope of the NRA's counterclaims was

---

[73] *Siegmund Strauss, Inc. v. E. 149th Realty Corp.*, 960 N.Y.S.2d 404, 406 (1st Dept. 2013) (quoting *Leon v. Martinez*, 84 N.Y.S.2d 83, 87–88 (1994)).
[74] *Id.* (quoting *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (internal quotation marks omitted)).
[75] *See Seldon v. Allstate Ins. Co.*, 107 A.D.3d 424, 971 N.Y.S.2d 438 (1st Dept. 2013); *Facie Libre Associates I, LLC v. SecondMarket Holdings, Inc.*, 103 A.D.3d 565 (1st Dept. 2013); *Vanship Holdings Ltd. v. Energy Infrastructure Acquisition Corp.*, 65 A.D.3d 405, 408 (1st Dept. 2009).

narrowed as a result of the Court's Decision and Order, dated March 2, 2022, dismissing the Attorney General's dissolution claims."[76] Specifically, it holds that "to the extent the counterclaims seek declaratory and injunctive relief stemming from the dissolution claims, those claims are moot."[77] Thus, throughout its opinion, the lower court evaluates only the NYAG's investigation, ignoring her subsequent dissolution lawsuit.[78]

This is error. The decision below cites no case law for the proposition that the NRA's counterclaims for declaratory and injunctive relief "stemming from the dissolution claims" had been mooted in any way by his earlier ruling.[79] And this holding is incorrect as a matter of law.

The New York Court of Appeals has made clear that, where a discriminatory motive taints the entire enforcement action, the proper remedy is dismissal of the action in its entirety.[80] As the Court explained, "The theory is that conscious discrimination by public authorities taints the integrity of the legal process to the degree that no court should lend itself to adjudicate the merits of the enforcement action."[81] Thus, "the claim of unequal protection is treated not as an affirmative defense to" the imposition of a specific regulatory sanction, "but rather as a motion

[76] R. Vol. 1 at 7.
[77] *Id*.
[78] *Id*. at 5–12 (focusing solely on whether James's decision to investigate was retaliatory).
[79] *Id*.
[80] *303 W. 42nd St. Corp*., 6 N.Y.2d at 694.
[81] *Id*.

to dismiss or quash the official action."[82]

Federal law similarly confirms that the unlawfulness of a civil action brought for unconstitutional reasons cannot be "cleansed" of this taint by a subsequent judicial ruling. That is because adverse action by government officials based on hostility towards protected speech violates the Constitution notwithstanding any subsequent remedial measures.[83]

"The First Amendment bars a criminal prosecution where the proceeding is motivated by the improper purpose of interfering with the defendant's constitutionally protected speech."[84] In determining whether a civil suit was motivated by unconstitutional animus, the Court must inquire "whether, as a practical matter, there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or punitive animus towards the defendant because he exercised his specific legal right."[85] "The analysis is directed to determining how the decision to prosecute was actually made in the case under consideration. The court may not permit vindictiveness to be hidden behind

---

[82] *Id*.

[83] *Locurto*, 264 F.3d at 169 (2d Cir. 2001); *Nat'l Council of Arab Americans,* 478 F. Supp. 2d at 491.

[84] *P.H.E., Inc.*, 965 F.2d at 849 (quoting *United States v. Raymer*, 941 F.2d 1031 (10th Cir. 1991) (internal quotation marks omitted)). As explained *infra*, the NYAG's actions should not be held to the higher standards for showing that a criminal prosecution was motivated by an unconstitutional motive. But, even under those higher standards, the NRA's counterclaims challenging the ongoing NYAG civil suit are not in any way moot.

[85] *Id*. at 858 (quoting *Raymer*, 941 F.2d at 1042).

procedural cosmetics."[86] And "even a good faith decision to continue a constitutionally tainted prosecution does not erase the taint when, as alleged here, the prosecution continues to utilize the fruits of the tainted behavior."[87]

Thus, the lower court's subsequent decision to dismiss the NYAG's dissolution claim does not remedy her improper motive in bringing the action in the first place, and it does not moot the NRA's claims for injunctive and declaratory relief against her ongoing suit.[88] Indeed, the NRA's counterclaims seek dismissal of "this action in its entirety," not the dismissal of specific remedies.[89] And they charge that the suit in its entirety was motivated by an illicit, unconstitutional purpose.[90] Thus, as *303 W. 42nd St. Corp.* directs, upon a finding of constitutionally-prohibited motive, the correct result is dismissal of the entire action with leave to refile "when and if the public authorities cure the defects in their enforcement methods."[91]

The lower's court finding that the NRA's requests for injunctive and declaratory relief are partially moot is incorrect for an additional reason. The NRA alleges that the NYAG's suit was part of a coordinated effort by New York officials

---

[86] *Id*. (emphasis added).
[87] *Id*. at 859 (10th Cir. 1992).
[88] *Id*.
[89] R. Vol. 1 at 74.179.
[90] *Id*. at 74.141–47.
[91] *303 W. 42nd St. Corp.*, 46 N.Y.2d at 694. The NRA seeks a declaratory judgment that James's actions are unconstitutional, injunctive relief including dismissal of the action, and attorney's fees and costs pursuant to New York Civil Practice Law and Rules § 8601. R. Vol. 1 at 74.179. It no longer seeks money damages against James.

to drive it into bankruptcy.[92] The NYAG, ex-Governor Cuomo, and other high-ranking New York officials have openly proclaimed that they sought to bankrupt the NRA in retaliation for its First Amendment-protected gun rights advocacy.[93] Those officials have worked together to dissolve the NRA, seize its assets, and cut off its financial resources by illegally pressuring financial institutions to blacklist it.[94]

The NYAG's lawsuit thus "presents an unusual, perhaps unique confluence of factors: substantial evidence of an extensive government campaign, of which this [action] is only a part, designed to use the burden of repeated [regulatory actions] to chill the exercise of First Amendment rights."[95] As in *P.H.E.*, James's civil action "is said to be part of a larger strategy of multiple [regulatory actions] designed in part to drain [the NRA's] financial resources."[96] And, also like *P.H.E.*, "the government's motive here is . . . to burden the appellants with massive costs of defending themselves so as to drive them out of business, even though it is conceded that" the NRA's advocacy "is protected by the First Amendment" against any sort of regulatory reprisals.[97] Where the government seeks to "use the agents and instrumentalities of law enforcement to curb speech protected by the First Amendment" via a "campaign of harassment and intimidation," injunctive and

[92] R. Vol. 1 at 74.144–48, 74.163.
[93] *Id*. at 74.141–42, 74.144–45.
[94] *Id*.
[95] *P.H.E., Inc*., 965 F.2d at 855.
[96] *Id*. at 854.
[97] *Id*.

declaratory relief are available to stop the unconstitutional campaign.[98] The Supreme Court has squarely held that First Amendment requires courts "to look through forms and recognize that informal censorship may sufficiently inhibit [speech] to warrant injunctive relief."[99]

Here, James's civil suit, which the NRA alleges was motivated by unconstitutional animus, continues today, and the harm from that suit that continues to be immense.[100] This includes "damage due to reputational harm, as well as injury to the NRA's trade, business, or profession" and "significant unnecessary expenditures to defend the investigation initiated by James and her commencement of this proceeding."[101]

Further, any deprivation of the NRA's First Amendment rights irreparably harms the NRA, warranting injunctive and declaratory relief.[102] Thus, contrary to

---

[98] *Id*. at 856 (citing *Dombrowski v. Pfister*, 380 U.S. 479 (1975) and *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963)).
[99] *Bantam Books, Inc.*, 372 U.S. at 67.
[100] As noted *supra*, the NYAG's lawsuit continues to proceed against the NRA, with the NYAG seeking "an independent compliance monitor with responsibility to report to the Attorney General and the Court" in place of original request for total dissolution. (NYSCEF Doc No. 646 at 175). Appointment of an independent compliance monitor with vast administrative powers who would report directly to the NYAG would cripple the NRA's ability to raise money or effectively advocate for the interests of its members.
[100] R. Vol. 1 at 74.144–51.
[101] *Id*. at 74.169–70; *see also Pen Am. Ctr., Inc. v. Trump*, 448 F. Supp. 3d 309, 325 (S.D.N.Y. 2020) ("An organization is injured when" it is "forced 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 [the] organization's core activities.") (cleaned up).
[102] *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("[L]oss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Hartford Courant*

decision below,[103] no part of the NRA's claims for injunctive or declaratory relief have been mooted. And the lower court was accordingly wrong to focus its analysis on whether James's investigation into the NRA was retaliatory, without considering whether her dissolution and asset-seizure suit was also retaliatory.[104]

Finally, the lower court incorrectly suggests that James's absolute immunity from monetary damages stemming from "the 'judicial phase' of the litigation itself" means that she is also immune from injunctive and declaratory relief.[105] But a prosecutor's "entitlement to absolute immunity from a claim for damages . . . does not bar the granting of injunctive relief, or of other equitable relief."[106] Thus, to the extent that the decision below implies that absolute immunity means that "the remaining portions of the [NRA's] counterclaims focus primarily on her decision to investigate the NRA following her public comments denouncing the organization," he errs and reversal is necessary.[107] The NRA's counterclaims focus on both the investigation and the subsequent enforcement action, and the decision below has no

---

Company, LLC v. Carroll, 986 F.3d 211, 224 (2d Cir. 2021); *Time Square Books, Inc. v. City of Rochester*, 223 A.D.2d 270, 278 (4th Dep't 1996).

[103] R. Vol. 1 at 7.

[104] *Id*. at 9–16 (focusing solely on whether James's decision to investigate was retaliatory).

[105] *Id*. at 8.

[106] *Shmueli*, 424 F.3d at 239; *see also Pulliam*, 466 U.S. at 536–37; *Singleton*, 956 F.3d at 778 n. 3 ("Absolute and qualified immunity protect only *individuals* from claims for *damages*; they do not bar official-capacity claims or claims for injunctive relief." (emphasis in original)).

[107] R. Vol. 1 at 8.

sound basis for separating them.[108]

III. THE LOWER COURT IMPROPERLY DISMISSES THE NRA'S COUNTERCLAIMS FOR FIRST AMENDMENT RETALIATION.

Moving to the NRA's first four counterclaims for retaliation in violation of the First Amendment and Article I of the New York Constitution, the NRA must allege three elements: "(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."[109]

Here, the first two points are not disputed. While James believes that the NRA's speech is "poisonous" and "deadly propaganda" in seeking to justify using state power to shut it down,[110] there is no question that, under the First Amendment, the NRA engaged in First Amendment-protected gun rights advocacy.[111]

Second, there can be no question that James's investigation into the NRA's finances, and her subsequent lawsuit seeking to shut down the NRA and seize all of its assets, was an adverse action.[112] Undoubtedly, a person (or non-profit) of ordinary firmness would think twice about speaking out if doing so carried a threat that the

---

[108] *Id.* at 74.179 (seeking dismissal of "this action in its entirety," not the dismissal of specific remedies), 74.144–51 (charging that the investigation and the subsequent lawsuit were both motivated by an unconstitutional purpose).
[109] *Id.* at 8 (quoting *Dolan v. Connolly*, 794 F.3d 290, 294 (2d Cir. 2015)).
[110] *Id.* at 74.141.
[111] *Id*. at 74.143-44.
[112] *Dear v. Nair*, No. 21-2124, 2022 WL 2165927, at *5 (10th Cir. June 16, 2022).

state's chief non-profit regulator would seek to shut it down and seize its assets.[113]

Thus, the only issue is causation. And here, the lower court clearly errs in ruling that the NRA could not prevail as a matter of law. The Second Circuit has held that the filing of a civil lawsuit by a governmental entity may violate the First Amendment "if the [plaintiff is] successful in persuading a jury that [the defendant was] prompted to file [its lawsuit] with retaliatory intent."[114] The Second Circuit has held that the "traditional dual-motivation analysis" of *Mt. Healthy* applies under such circumstances, placing the burden on the NYAG to "persuade the jury that [it] would have filed the [dissolution lawsuit] even in the absence of the impermissible reason."[115] And the Second Circuit has made clear—as has every other circuit court—that causation questions under *Mt. Healthy* are matters for the jury to decide.[116]

Thus, the lower court wrongly dismisses the NRA's First Amendment retaliation claim on causation grounds without applying the *Mt. Healthy* burden shifting framework. And it incorrectly decides causation as a matter of law in the face of the NYAG's own admissions that she brought her dissolution-and-asset-

---

[113] *Brandon v. Kinter*, 938 F.3d 21, 40 (2d Cir. 2019).
[114] *Greenwich Citizens Comm., Inc.*, 77 F.3d at 31.
[115] *Id*. (citing *Mt. Healthy*, 429 U.S. at 287).
[116] *Id*.; *see also Rodgers v. Banks*, 344 F.3d 587, 603 (6th Cir. 2003) (causation under *Mt. Healthy* "is generally a jury question"); *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1315 (9th Cir. 1989) (same); *Hesse v. Bd. of Educ. of Twp. High Sch. Dist. No. 211, Cook Cnty., Ill.*, 848 F.2d 748, 753 (7th Cir. 1988) (same).

seizure lawsuit out of a desire to shut the NRA down for its speech.[117]

A. Disputed Causation Issues, Like Those Presented Here, May Not Be Summarily Resolved, as The Lower Court Does Here

Hotly disputed, fact-based causation issues, like those presented in this case, are typically jury questions in First Amendment retaliation cases. They usually cannot be resolved on summary judgment, let alone on a motion to dismiss, as the lower court does here.[118] "Where causation is disputed, summary judgment is not appropriate unless only one conclusion may be drawn from the established facts."[119]

Notably, the NRA obtained no discovery regarding causation in this case before its First Amendment counterclaims were dismissed. That is particularly troubling because causation is an extremely fact-bound inquiry, involving detailed assessments of official motive and fine-grained credibility determinations.

To take just one example, in *Warren*, the court engaged in extremely detailed parsing of "all the record evidence" and made "corresponding credibility assessments" before determining that the Florida Governor Ron DeSantis would have terminated a county prosecutor based on his official even without considering the prosecutor's political views and advocacy.[120] The absence of any discovery or

---

[117] R. Vol. 1 at 74.144–151.
[118] *McAdams v. Ladner*, 2022 WL 2286767, at *9 (S.D. Miss. June 23, 2022) ("causation in First Amendment retaliation cases is typically a jury question.") (citing *Brady v. Fort Bend Cty.*, 145 F.3d 691, 712 (5th Cir. 1998)).
[119] *Marino v. Jamison*, 189 A.D.3d 1021, 1022 (2d Dep't 2020) (quoting *Speller ex rel. Miller v. Sears, Roebuck & Co.*, 100 N.Y.2d 38, 44 (2003)).
[120] *Warren*, 2023 WL 345802, at *3–*11.

inquiry by the lower court into the NYAG's actual motivation for taking adverse action against the NRA stands in stark contrast to both federal and New York precedent. As the Appellate Division has warned, "without a searching inquiry, those intent on punishing the exercise of constitutional rights could easily mask their behavior behind a complex web of post hoc rationalizations."[121]

As explained *infra*, the NRA's Answer presents direct evidence of a causal connection between James's animus and her lawsuit, and fatally undermines the primary remedies that she sought: dissolution and seizure of the NRA's assets.[122] As such, this case bears no resemblance to the two cases cited by the lower court in support of the notion that causation issues can be disposed of on a motion to dismiss: *Avery v. DiFiore*[123] and *Richards v City of New York*.[124] Both of those cases involved bare-bones pleadings with completely speculative or non-existent allegations of causation. In *Avery*, the plaintiff was a judge (Avery) who was denied reappointment in 2018, six years after suffering harassment by a colleague at a dinner event in 2012. She then complained about the incident to her supervisor, who subsequently treated her "in a much different and more negative fashion."[125] But Avery sued neither her alleged harasser nor the former supervisor who allegedly mistreated her.

---

[121] *McManus v. Grippen*, 244 A.D.2d 632, 634 (3d Dep't 1997); *see also Natl Council of Arab Americans,* 478 F. Supp. 2d at 491; *Nicholas*, 376 F. Supp. 3d at 277.
[122] R. Vol. 1 at 74.144–61.
[123] 2019 WL 3564570, at *3–5 (S.D.N.Y. Aug. 6, 2019).
[124] 2021 WL 3668088, at *3 (S.D.N.Y. Aug. 18, 2021).
[125] *Avery*, 2019 WL 3564570, at *1.

Instead, she sued the Chief Administrative Judge (Marks) who denied her reappointment and "four other active New York State judges . . . who, at one point or another, had supervisory authority over her."[126] "[W]ith respect to all four supervising judges, Avery allege[d] nothing about what they said or did in connection with Judge Marks' decision." Moreover, "the few specific facts" she did allege failed to establish any causal connection whatsoever between her complaint of harassment and her denial of reappointment.[127] For example, she alleged that one of the supervising judges who allegedly provided a recommendation was "a personal friend and golfing companion of the alleged harasser."[128]

In *Richards*, a *pro se* plaintiff alleged that the New York Police Department began following him, stopping him, and ticketing him for traffic violations after he reported a physical attack by his manager at his then-employer, an unnamed New York City agency.[129] But the plaintiff himself "provide[d] a lawful explanation for each of his police encounters," admitting that in each instance he had violated traffic or parking laws.[130] And the plaintiff failed to provide any connection whatsoever "between his complaints to police officials and the subsequent traffic tickets and stops."[131] In those circumstances, the Court found that causation had not been

[126] *Id*.
[127] *Id*. at *4 (cleaned up).
[128] *Id*.
[129] *Richards*, 2021 WL 3668088, at *1.
[130] *Id*. at *3.
[131] *Id*.

sufficiently pleaded.

The allegations in this case bear no resemblance to *Avery* or *Richards*. Here, James brazenly declared her desire to use her office to dissolve the NRA out of extreme distaste for its political advocacy.[132] If any inference is necessary, it is merely that James was stating her honest beliefs about and intentions for the NRA—precisely the kind of inference a court must make in favor of a claimant at the motion to dismiss stage.[133]

B. The Causal Connection Element is Satisfied Where the Plaintiff Points to Direct Evidence that the Government's Action Was Retaliatory in Nature

Dismissal is also inappropriate because the NRA presented direct evidence of a causal connection between James's enforcement action and her animus against the NRA. Contrary to the lower court's ruling, direct evidence of discriminatory animus obviates the need for any additional showing of causation.[134]

Nearly 40 years ago, the New York Court of Appeals recognized that "admission of intentional discrimination is likely to be rare; law enforcement officials are unlikely to avow that their intent was to practice constitutionally

---

[132] R. Vol. 1 at 74.144-51.

[133] *Siegmund Strauss, Inc.*, 960 N.Y.S.2d at 406.

[134] *See Trans World Airlines, Inc. v. Thurston* 469 U.S. 111, 121 (1985); *Roberts v. Winder*, 16 F.4th 1367, 1382 (10th Cir. 2021) ("Here, no inferences are required because [the plaintiff] provided direct evidence of a discriminatory motivation" for his termination); *Beckwith v. City of Daytona Beach Shores, Fla.*, 58 F.3d 1554, 1565 (11th Cir. 1995) ("direct evidence of discriminatory motive, standing alone, is usually sufficient to create a jury question on the issue of intent"); *Brown*, 989 F.2d at 861.

proscribed discrimination."[135] Accordingly, the Court of Appeals insisted on certain standards for claims based solely on indirect evidence, reasoning that "[o]rdinarily . . . a strong inference of illicit motive will be all that can be expected."[136]

So too, in *Hartman*, the Supreme Court described the absence of probable cause as "highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation."[137] It did not insist on absence of probable cause where there was direct evidence of retaliatory motive.[138]

This is the rare case where a government official has admitted that her retaliatory motive spurred her to bring a civil enforcement action.[139] Thus, there is no need for recourse to the standards—such as a requirement that the plaintiff show that the complained-of adverse action had no other possible basis—that apply where the plaintiff must rely solely on inferential evidence.

In *Smith v. County of Suffolk*, for example, the Second Circuit held that where, in light of facts pled by the plaintiff, "a reasonable juror could conclude that [the defendant's] actions were motivated, at least in part, by retaliatory animus," summary resolution is inappropriate unless the defendant can show that it "would

---

[135] *303 W. 42nd St. Corp.*, 46 N.Y.2d at 695.
[136] *Id*.
[137] *Hartman*, 547 U.S. at 261 (emphasis added).
[138] *See also Gullick v. Ott*, 517 F. Supp. 2d 1063, 1072 (W.D. Wis. 2007) (in a First Amendment retaliation case, a "[p]laintiff may meet his burden [of showing causation] with direct evidence . . . or with circumstantial evidence, such as suspicious timing or evidence that defendant's stated reasons for his actions are false.").
[139] R. Vol. 1 at 74.144–51.

have taken the same adverse action[s] in the absence of the protected speech."[140] Such a showing is not made by "general conclusion[s]," but rather requires a particularized demonstration that the defendant "would have reached *the same decision* . . . even in the absence of the protected conduct."[141]

Most critically, "[a] general statement that the employer would have taken *some* adverse action will not suffice."[142] It follows that the NYAG cannot avoid First Amendment liability by claiming that she would have taken some investigative or enforcement action against the NRA even apart from her animus to its viewpoint. She must show that she would have taken the same enforcement action she did take—in this case, her suit seeking dissolution of the NRA and seizure of its assets. Given the NRA's detailed factual allegations and the lack of any other New York non-profit whose complete dissolution was sought based on alleged malfeasance by individual executives,[143] the NYAG cannot meet this burden.

In contexts outside the First Amendment, where the plaintiff presents direct evidence of a link between government's discriminatory intent and the discriminatory action, the plaintiff makes out a *prima facie* case of discrimination.[144] At that point, the burden shifts to the defendant to show that it would have taken the

---

[140] 776 F.3d at 121–22.
[141] *Id.* at 123 (quoting *Mt. Healthy*, 429 U.S. at 287) (emphasis in original).
[142] *Id.* (emphasis in original); *see also McCue v. Bradstreet,* 807 F.3d 334, 345 (1st Cir. 2015).
[143] *See* R. Vol. 1 at 74.152–50.
[144] *See Trans World*, 469 U.S. at 121.

same action in the absence of a discriminatory motive.[145] Thus, the plaintiff in an race, age, gender or other discrimination suit need not satisfy the burden-shifting test laid out in *McDonnell Douglas v. Green* where there is direct evidence of discriminatory intent.[146] The burden-shifting framework of *McDonnell Douglas* plays a similar role to the "no probable cause" requirement of *Hartman* and *Nieves*: it sets the parameters for a plaintiff who seeks to prove that an action was discriminatory or retaliatory by indirect evidence only.[147]

Where the defendant admits her retaliatory intent, however, there is no need to inquire into whether the defendant nonetheless had "probable cause" to take the adverse action.[148] That is because "it can never be objectively reasonable"—or constitutional—"for a government official to act with the intent that is prohibited by law."[149] Whether the government official could have taken the action for non-retaliatory reasons is totally irrelevant unless the government official proves to the court that that action would have been taken regardless of the protected speech at issue.[150]

Direct evidence is evidence which, if believed, proves the fact of retaliatory

---

[145] *See*, *e.g.*, *Kitchen v. BASF*, 952 F.3d 247, 252–53 (5th Cir. 2020).
[146] *McDonnell Douglas v. Green*, 411 U.S. 792 (1973); *see Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 511 (2002); *Trans World*, 469 U.S. at 121 ("[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination").
[147] *Trans World*, 469 U.S. at 121.
[148] *Id*.
[149] *Locurto*, 264 F.3d at 169.
[150] *See Mt. Healthy*, 429 U.S. at 287; *see also P.H.E.*, 965 F.2d at 860.

intent without inference or presumption.[151] It connects the retaliatory intent and the retaliatory deed.[152] Courts have looked to four factors in considering whether a plaintiff's statements constitute "direct evidence" of retaliatory motive: whether the statements 1) relate to the plaintiff's protected activity; 2) are proximate in time to the challenged action; 3) made by an individual with authority over the challenged action; and 4) relate to the challenged action.[153] The ultimate focus is whether the evidence "shows that the impermissible criterion played some part in the decision-making process."[154]

Here, before taking office, James called the NRA an "organ of deadly propaganda masquerading as a charity" and vowed to wield the NYAG's nonprofit-supervisory power against the NRA and its financial supporters.[155] She made the political prosecution of the NRA a central theme of her Attorney General campaign. James promised that, if elected, her "top issue" would be "going after the NRA because it is a criminal enterprise."[156] She vowed to follow Cuomo's financial-blacklisting campaign by "put[ting] pressure upon the banks that finance the NRA" to choke off support for its Second Amendment speech.[157]

---

[151] *Brown*, 989 F.2d at 861.
[152] *See id*.
[153] *Etienne v. Spanish Lake Truck & Casino Plaza, L.L.C.,* 778 F.3d 473, 475–76 (5th Cir. 2015).
[154] *Barbano v. Madison County*, 922 F.2d 139, 145 (2d Cir.1990).
[155] R. Vol. 1 at 97.
[156] *Id.* at 74.146.
[157] *Id*.

She made false, defamatory assertions that the NRA engaged in criminal activity.[158] She stated: "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."[159] James further stated that "the NRA holds [itself] out as a charitable organization, but in fact, [it] really [is] a terrorist organization."[160] She repeatedly made clear that she saw "no distinction" between the NRA's charitable existence and its ability to engage in pro-gun political speech, which she characterized as "poisonous" and "deadly propaganda."[161]

James then immediately followed through on her threats. Shortly after taking office, she began her long-promised investigation into the NRA's finances, personnel, operations, and political strategy, all with the purpose of damaging the NRA politically, diverting its corporate resources, and contriving a pretext to dissolve the NRA.[162] She initiated her investigation without making any meaningful effort to engage NRA leadership, without giving the NRA a fair opportunity to take appropriate action to address compliance issues raised by the NYAG, and without allowing the NRA to correct alleged deficiencies, as would be expected in any

[158] *Id.* at 74.146-47.
[159] *Id*.
[160] *Id.* at 74.147.
[161] *Id*. at 74.141.
[162] *Id*. at 74.142–43.

dissolution action.[163]

This is direct evidence. That is, it is "evidence which, in and of itself, shows a discriminatory animus."[164] James's comments satisfy all four factors for measuring direct evidence. [165] First, James's comments relate directly to the NRA's First Amendment-protected guns right advocacy. She could not have been more scathing, calling the NRA's advocacy "poisonous" and "deadly propaganda,"[166] stating that "the NRA holds [itself] out as a charitable organization, but in fact, [it] really [is] a terrorist organization,"[167] and commenting that she saw "no distinction" between the NRA's charitable existence and its ability to engage in pro-gun political speech.

Second, her comments were close in time to the challenged action, coming immediately before she took office and launched her investigation into the NRA.

Third, James's comments were made by an individual with authority over the challenged action—the NYAG herself.

Fourth, James's statements relate to the challenged action: her lawsuit seeking to dissolve the NRA and seize its assets. James specifically promised to weaponize the powers of her office in order to target the NRA, and she vowed that she would pursue financial institutions and donors linked to the NRA as if they were supporters

[163] *Id*. at 74.142–43, 74.148.
[164] *Jackson v. Harvard Univ.*, 900 F.2d 464, 467 (1st Cir. 1990).
[165] *Etienne*, 778 F.3d at 475–76.
[166] R. Vol. 1 at 74.141.
[167] *Id.* at 74.147.

of Al Qaeda or the mafia.[168] She made the political prosecution of the NRA a central theme of her Attorney General campaign, promising that, if elected, her "top issue" would be "going after the NRA because it is a criminal enterprise."[169]

In *Smith*, the Second Circuit looked to the "plain language" of the retaliators, finding that it "directly implicate[d] not only the fact that Smith had engaged in protected speech, but also the content of that speech."[170] So too do James's statements implicate both the NRA's protected speech and its pro-Second Amendment content.[171] She expressly linked her animus against the NRA's viewpoint with her desire to use her nonprofit-supervisory power as NYAG to dissolve it and seize all its assets.[172]

The NRA accordingly pleads a *prima facie* case of retaliation. Under *Mt. Healthy*, the burden then shifts to the NYAG, which must bear its burden of showing that it would have sought dissolution absent its retaliatory animus towards the NRA.[173] Moreover, the NYAG cannot defeat the NRA's First Amendment claims by asserting that it would have taken some enforcement action against the NRA even

---

[168] *Id.* at 74.141.
[169] *Id.* at 74.146.
[170] *Smith*, 776 F.3d at 121; *see also Perryman v. Johnson Products Co.*, 698 F.2d 1138, 1143 (11th Cir. 1983) ("If the factfinder believes the direct evidence presented by the plaintiff, a presumption is created that the adverse employment action taken against the plaintiff was a product of that discriminatory intent.").
[171] *See* R. Vol. 1 at 74.141.
[172] *Id.* at 74.142–43.
[173] *See Mt. Healthy*, 429 U.S. at 287; *see also P.H.E., Inc.*, 965 F.2d at 860.

apart from James's extreme animus to its viewpoint. It must show that she would have sought dissolution of the NRA and seizure of all its assets even if she had no animus towards its pro-Second Amendment advocacy.[174]

The NYAG has made no attempt to make the requisite showing on this point. The NRA has pleaded James's retaliatory animus in detail.[175] And she cannot point to any other New York non-profit whose complete dissolution was sought based on alleged malfeasance by individual executives.[176] The lower court errs in finding that generalized assertions that the NYAG "would have taken *some* adverse action" against the NRA suffice to carry its burden of showing it would have sought complete dissolution and seizure of the NRA's assets absent her retaliatory animus.[177]

C. The Lower Court Errs in Refusing to Accept the NRA's Well-Pleaded Allegations of the NYAG's Retaliatory Animus as True

The lower court additionally errs in failing to accept the NRA's well-pleaded allegations of retaliatory animus in its Answer as true and refusing to give the NRA the benefit of favorable inferences.

In considering a motion to dismiss, the court must "accept the facts alleged in the pleading as true and accord the opponent of the motion . . . 'the benefit of every

[174] *Smith*, 776 F.3d at 123.
[175] R. Vol. 1 at 74.166.
[176] *See id.* at 74.152–59.
[177] *Smith*, 776 F.3d at 123 (emphasis in original).

possible favorable inference [to] determine only whether the facts as alleged fit within any cognizable legal theory.'"[178] Thus, the lower court was required to liberally construe the NRA's pleadings and deny the motion "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law."[179]

Here, the lower court refuses to believe the NRA's well-pleaded allegations of the NYAG's professed intention to use her office to retaliate against the NRA for its viewpoint by seeking to dissolve it and seize its assets. It dismisses the NRA's direct evidence of her retaliatory intent in a footnote, stating that "as evidence of personal animus, [the NYAG's] campaign-trail rhetoric is relevant only if the NRA alleges a sufficient causal link between the animus and the adverse action, which it has not."[180] But this reasoning is circular and misconstrues both the NRA's pleadings and the governing jurisprudence.

It first defines James's own words declaring her intent as relevant to her intent only if the NRA makes some additional showing that she really meant what she said. In so doing, the lower court essentially creates a presumption that a public official's speech is meaningless puffery unless a party can find extrinsic evidence to prove

[178] *Siegmund Strauss, Inc.*, 960 N.Y.S.2d at 406 (quoting *Leon*, 84 N.Y.S.2d at 87–88).
[179] *Id.* (quoting *Jennifer Realty Co.*, 98 NY2d at 152 (internal quotation marks omitted)); *see also* CPLR 3211(a)(7).
[180] R. Vol. 1 at 11 n. 6.

that the public official really meant her own words. This is a far cry from the deference the lower court was required to provide the NRA. Rather than "accord plaintiffs the benefit of every possible favorable inference," the lower court draws the implausible inference that the NYAG did not really mean her own words.[181]

Additionally, the decision below fails to give credence to the NRA's clear pleading of a causal link between James's statements and the adverse action taken against the NRA by the NYAG.[182] The NRA pleads, *inter alia*, that "[d]ue to her animus against the NRA, James chose to exercise her discretion to harm the NRA."[183] That allegation is amply supported by specific facts pled in the Answer—for example, her own words admitting that she would exercise her discretion as NYAG to destroy the NRA.[184] New York law does not permit a court to disbelieve such core allegations of a plaintiff's complaint at the motion to dismiss stage.[185]

The lower court's refusal to assume the truth of the facts pleaded in NRA's Answer leads it to misconstrue the NRA's pleading of direct evidence—James's own statements declaring her retaliatory intent—as merely indirect evidence. This, in turn, causes it to misapply case law and place the burden on the NRA to prove that the NYAG really meant her own words.

---

[181] *Siegmund Strauss, Inc.*,960 N.Y.S.2d at 406 (quoting *Leon*, 84 N.Y.S.2d at 87–88)).
[182] *Id*.
[183] R. Vol. 1 at 74.166.
[184] *Id.* at 74.141–48.
[185] *See, e.g., Amsterdam Hosp. Grp., LLC v. Marshall-Alan Assocs., Inc.*, 992 N.Y.S.2d 2, 4 (2014) ("a motion to dismiss . . . obliges the court to accept the complaint's factual allegations as true").

The lower court also suggests that the NYAG's own First Amendment rights protect her from scrutiny in this matter. But the NRA does not complain of James's exercise of those rights. It simply points to the plain meaning of her words and asks the Court to take them for what they are—direct evidence of James's animosity towards the NRA, and a clear statement of her intent to the use her powers as NYAG to destroy the NRA for its advocacy. It would be strange indeed if doing so were somehow construed to be a violation of her First Amendment rights.

If the decision below stands, it would completely reverse the First Amendment's intended use as a check on the power of public officials. The First Amendment states that Congress "shall make no law . . . abridging the freedom of speech."[186] But under the lower court's view, by virtue of their office, public officials would effectively have a First Amendment right to violate the First Amendment rights of private citizens subject to their governance.[187] That is because citizens could not use the declarations of retaliatory intent from public officials as evidence of the public official's own animus.

D. Even in Cases Relying Upon Indirect Evidence, the "No Probable Cause" Standard Only Applies in the Distinctive

[186] U.S. CONST. amend. I.

[187] To be clear, public officials have no such First Amendment right. *See Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003) ("[a] public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant's direct regulatory or decisionmaking authority over the plaintiff, or in some less-direct form.").

Contexts of Criminal Prosecutions and Arrests; in Civil Cases, *Mt. Healthy* Applies

The lower court asserts that, to demonstrate causation, the NRA must show that the NYAG's enforcement suit was "without a lawful basis."[188] In addition, it requires the NRA to show that the lawsuit's allegations were "imaginary or not believed by" the Government.[189]

This standard would mean that government officials can freely announce their animus against speakers they do not like and even bring retaliatory lawsuits against those speakers, so long as the party retaliated against cannot provide a factual showing of its ability to peer into what the retaliator did or did not "imagine." That is, the government would have to admit not just that it sued a speaker for the speaker's advocacy, but also that it deliberately falsified facts or actively disbelieved its own claims—a level of culpability that is so high as to be quasi-criminal in nature.

Should the lower court's exceptionally high standard become law, First Amendment retaliation claims would be virtually impossible to prove—even in egregious cases where the retaliator declares her retaliatory intent openly. Further, First Amendment retaliation would be an unnecessary cause of action. That is because a plaintiff filing a suit based on imaginary factual allegations or factual or legal claims that it actively disbelieved would face not just dismissal of its suit and

[188] R. Vol. 1 at 9.
[189] Id.

severe sanctions—it would face possible criminal charges.[190]

The lower court imports the "no probable cause" standard from two U.S. Supreme Court cases that involved First Amendment retaliation claims in the criminal sphere—retaliatory prosecution[191] and retaliatory arrest.[192] Both cases made clear that the criminal context was crucial in imposing a "no probable cause" requirement. Both also made clear that the standard of *Mt. Healthy* applies in the civil context.[193]

Hartman's analysis cabined its additional "no probable cause" requirement "[w]hen the claimed retaliation for protected conduct is a criminal charge."[194] This was due to "the longstanding presumption of regularity accorded to prosecutorial decisionmaking."[195]

Hartman does not apply in the civil context. In *CarePartners, LLC v. Lashway*, for example, the Ninth Circuit declined to "impose a requirement on [the plainitffs] to plead and prove an 'absence of probable cause' with respect to [the

[190] *See* 22 NYCRR 130-1.1(a). New York law also imposes criminal liability on those who, *inter alia*, falsify written statements, swear to false statements in judicial proceedings, obstruct the lawful administration of judgment, or perjure themselves. N.Y. Penal Law §§ 210.45, 210,40, 195.05, 210.05.
[191] *Hartman*, 547 U.S. 250.
[192] *Nieves*, 139 S. Ct. 1715.
[193] *See Lozman*, 138 S. Ct. at 1952 (observing that *Hartman*'s "no probable cause" standard only applies "in the criminal sphere" and that *Mt. Healthy* applies in the civil context).
[194] *Hartman*, 547 U.S. at 260.
[195] *Id*. at 263.

government officials'] enforcement decisions" under *Hartman*.[196] The Ninth Circuit explained that "*Hartman* does not apply to this case because the [U.S. Supreme] Court made a clear distinction between retaliatory-prosecution actions to which the additional pleading and proof requirements apply, and 'ordinary' retaliation actions to which the requirements do not apply (i.e., where there is no independent prosecutorial action."[197] As one court has noted:

> If the claim is considered criminal in nature, the retaliatory prosecution analysis as found in *Hartman* is applicable, and an actionable claim requires the absence of probable cause. If civil in nature, however, the analysis would be the same as any other so-called retaliatory acts taken by government officials and caused by the constitutionally protected activity of the plaintiff.[198]

Nieves imported the "no probable cause" standard into the retaliatory arrest context because "[o]fficers frequently must make split-second judgments when deciding whether to arrest, and the content and manner of a suspect's speech may convey vital information—for example, if he is ready to cooperate or rather presents a continuing threat."[199] That analysis does not apply in the context of a civil enforcement action, which does not involve split-second judgments and where an entity's advocacy is not a "wholly legitimate consideration"—but rather a wholly

---

[196] 545 F.3d 867, 877 n. 7 (9th Cir. 2008).
[197] *Id*.
[198] *Chizmar v. Borough of Trafford*, No. 2:09-CV-188, 2011 WL 1200100, at *17 (W.D. Pa. Mar. 29, 2011), *aff'd*, 454 F. App'x 100 (3d Cir. 2011); *see also Gearin v. City of Maplewood*, 780 F. Supp. 2d 843, 861 (D. Minn. 2011).
[199] *Nieves*, 39 S. Ct. at 1724.

illegitimate one—in deciding whether bring suit.[200]

Indeed, it would not make sense to impose a "no probable cause" standard on a plaintiff claiming First Amendment retaliation outside the special circumstances of arrests and prosecutions. For one thing, "probable cause is a criminal-law concept having nothing to do with" the civil context.[201] For another, adverse action by government officials based on hostility to a speaker's political viewpoint violates the Constitution—period.[202]

As one court has recently emphasized in distinguishing *Nieves* from cases arising in non-criminal contexts, "*Nieves* did not recede from *Mt. Healthy—Nieves* said *Mt. Healthy* was different, not that it was no longer good law. In explaining the difference, *Nieves* cited a host of factors present when a law enforcement officer makes an arrest but not when" a state official orders an investigation and brings a civil lawsuit against a disfavored speaker.[203]

For example, "[a]rresting officers must make 'split-second judgments' in which the 'content and manner of a suspect's speech may convey vital information.'"[204] Not so in the context of a civil investigation or lawsuit, where an entity's political speech is a totally impermissible consideration and can have no

---

[200] *Id*.
[201] *Warren v. DeSantis*, No. 4:22CV302-RH-MAF, 2023 WL 345802, at *10 (N.D. Fla. Jan. 20, 2023).
[202] *Nat'l Council of Arab Americans*, 478 F. Supp. 2d at 491; *see also Locurto*, 264 F.3d at 169.
[203] *Warren*, 2023 WL 345802, at *10-*11.
[204] *Id*. at *11 (quoting *Nieves*, 139 S. Ct. at 1723-24).

probative value. And "[b]ecause probable cause is the essential prerequisite for an arrest, evidence of the presence or absence of probable cause for the arrest will be available in virtually every retaliatory arrest case."[205] That is not true of civil investigations or lawsuits, where "probable cause" is not an "essential prerequisite" and "probable cause" does not have an established legal meaning.[206]

Indeed, "[a]rrests are generally evaluated under the Fourth Amendment, where the Court has almost uniformly rejected invitations to probe subjective intent, an approach *Nieves* said would be undermined if the plaintiff in a retaliatory-arrest case could probe subjective intent."[207] By contrast, courts routinely probe subjective intent in the First Amendment context.[208]

Further, "[t]he interest in allowing officers to make 29,000 often-split-second arrests per day without incurring unnecessary litigation risks is simply not applicable to a decision" to investigate and bring an unprecedented dissolution-and-asset-seizure suit against the nation's oldest and largest civil rights organization based on its Second Amendment advocacy.[209]

Applying the "no probable cause" standard in the civil context also conflicts with New York law. In its decision, the lower court asserts that New York and

---

[205] *Id*. (cleaned up) (quoting *Nieves*, 139 S. Ct. at 1724).
[206] *Id*. at *10-*11.
[207] *Id*. at *11 (internal quotations marks and citation omitted) (citing *Nieves*, 139 S. Ct. at 1724-25).
[208] *See*, *e.g.*, *Natl Council of Arab Americans*, 478 F. Supp. 2d at 491 (collecting cases).
[209] *Warren*, 2023 WL 345802, at *11.; R. Vol. 1 at 74.4, 74.6, 74.148, 74.157.

federal law are the same for all purposes relevant to the NRA's counterclaims.[210] It is thus telling that the New York Court of Appeals has already rejected a "no probable cause" standard in the context of civil enforcement actions.

In *303 W. 42nd St. Corp.*, the Manhattan Borough Superintendent of the Department of Buildings brought a code enforcement action against a building owner that sought to construct an adult theatre and bookstore.[211] The Superintendent alleged that the building was a fire hazard.[212] But his real motive was "to 'clean up' the Times Square area by driving out of business purveyors of sexually explicit material."[213]

The Court of Appeals held that the building owner could pursue dismissal of the entire enforcement action, regardless of whether the Superintendent had a plausible case that the building was not in compliance with the fire code. The Court of Appeals noted that "in our State, the claim of unequal protection is treated not as an affirmative defense to criminal prosecution or the imposition of a regulatory sanction but rather as a motion to dismiss or quash the official action." [214] That is because "[t]he theory is that conscious discrimination by public authorities taints the integrity of the legal process to the degree that no court should lend itself to

[210] R. Vol. 1 at 13.
[211] 46 N.Y.2d at 690.
[212] *Id.* at 690–91.
[213] *Id.* at 691.
[214] *Id*. at 694.

adjudicate the merits of the enforcement action."[215] "This, even though the party raising the unequal protection claim may well have been guilty of violating the law."[216] Thus, the Court of Appeals concluded, "we see no reason here to prohibit the petitioner from invoking the constitutional right to defeat the commissioner's enforcement of the building code against it."[217]

303 W. 42nd St. Corp. shows that, under New York law, a plaintiff need not show an absence of probable cause to defeat a discriminatory enforcement claim in the civil context. Rather, where a plaintiff shows that a similarly-situated entity was treated differently and that the disparate treatment is based on an impermissible motive, a prima facie equal protection claim has been made under New York law.[218]

Here, the NRA pleads both elements.[219] Accepting the truth of its Answer and drawing inferences in its favor, as is required at this stage, the NRA pleads that its speech was constitutionally protected and a substantial or motivating factor in the NYAG's decision to bring an enforcement action against it.[220] Whether or not the NYAG had probable cause or not for her suit is irrelevant at this stage.[221]

---

[215] *Id*.
[216] *Id*.
[217] *Id*.
[218] *See id.* at 693.
[219] R. Vol. 1 at 74.144–67.
[220] *Id.* at 74.165–68.
[221] Even if the *Hartman* or *Nieves* standards applied here, the NRA has pleaded facts sufficient to survive a motion to dismiss. *Nieves* held that "the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been . . ." 139 S. Ct. at 1727.

The Second Circuit held that the "traditional dual-motivation analysis" of *Mt. Healthy* applies in retaliation cases based on the government's filing of a civil lawsuit against the plaintiff, placing the burden on the defendant to "persuade the jury that [it] would have filed the [dissolution lawsuit] even in the absence of the impermissible reason."[222] And the Second Circuit made clear—as has every other circuit court—that causation questions under *Mt. Healthy* are matters for the jury to decide.[223] Moreover, where, as here, the plaintiff pleads facts which plausibly show that the government acted with a retaliatory motive, the burden shifts back to the government to show it would have taken the same action—not a similar one, but the same one—absent the unlawful motive.[224]

Under *Mt. Healthy*, the burden shifts to the NYAG to show by the preponderance of the evidence that it would have sought dissolution and seizure of all of the NRA's assets suit even without its retaliatory animus.[225] It cannot do so. That the NRA was treated differently than other similar nonprofits is clear and evident from the face of the pleadings.[226] So too is the impermissible motive of

---

Here, the NRA has pled extensively that the NYAG did not seek dissolution against entities that were victims of similar alleged conduct by executives and had no basis whatsoever for doing so. R. Vol. 1 at 74.155–61.

[222] *Greenwich Citizens Comm., Inc.*, 77 F.3d at 31 (citing *Mt. Healthy*, 429 U.S. at 287).

[223] *Id.*; *see also Rodgers*, 344 F.3d at 603; *Soranno's Gasco, Inc.*, 874 F.2d at 1315; *Hesse.*, 848 F.2d at 753; *Natl Council of Arab Americans*, 478 F. Supp. 2d at 491 (collecting cases).

[224] *Smith*, 776 F.3d at 121–22; *P.H.E.*, 965 F.2d at 860.

[225] *See Mt. Healthy*, 429 U.S. at 287.

[226] R. Vol. 1 at 74.153–58.

personal animus towards the NRA and its mandate to support and defend a key tenet of the Bill of Rights.[227] Of particular relevance, the Answer pleads that James' investigation was part of a larger scheme of New York officials, including Andrew Cuomo, "to 'find' reasons to commence legal actions against the NRA" in order to "bankrupt the NRA" due to its advocacy.[228]

E. Under *Lozman*, the "No Probable Cause" Standard Does Not Apply Where, as Here, the Plaintiff Alleges an Official State Policy of Retaliation

The decision below also ignores the NRA's allegations of an official state policy to retaliate against the NRA for its advocacy.

Under settled law, plausible allegations of an official policy of First Amendment retaliation state a cognizable legal claim. As the U.S. Supreme Court has explained, "An official retaliatory policy is a particularly troubling and potent form of retaliation, for a policy can be long term and pervasive, unlike an ad hoc, on-the-spot decision by an individual officer."[229] In addition, "[a]n official policy also can be difficult to dislodge. A citizen who suffers retaliation by an individual officer can seek to have the officer disciplined or removed from service, but there may be little practical recourse when the government itself orchestrates the retaliation."[230] Thus, "when retaliation against protected speech is elevated to the

[227] *See id.* at 74.144-51.
[228] *See id*. at 74.147-49.
[229] *Lozman,* 138 S. Ct. at 1954.
[230] *Id*.

level of official policy, there is a compelling need for adequate avenues of redress."[231]

Here, the NRA pleads that New York formulated and carried out an official policy to crush the NRA for its gun rights advocacy.[232] That is, James, ex-Governor Cuomo, and other high-ranking New York officials openly proclaimed that they sought to bankrupt the NRA in retaliation for its First Amendment-protected gun rights advocacy.[233] It was not merely James denouncing and promising to act to silence the NRA's protected speech—former Governor Cuomo, the New York Department of Financial Services, and others worked in concert with the NYAG to bring about a campaign to legally, publicly, and financially undermine the NRA.[234] Further, the NYAG took regulatory action—a lawsuit seeking the dissolution of the NRA and seizure of all its assets—that it had never taken against non-profit entities facing similar allegations.[235]

Thus, the NYAG's lawsuit "presents an unusual, perhaps unique confluence of factors: substantial evidence of an extensive government campaign, of which this [action] is only a part, designed to use the burden of repeated [regulatory actions] to

---

[231] *Id*.
[232] R. Vol. 1 at 74.176–88.
[233] *Id*. at 74.141–42, 74.144–46.
[234] *See id*. at 74.141–43, 74.151, 74.160.
[235] *See id*. at 74.152–61; *cf*. *Nieves*, 139 S. Ct. at 1727 ("the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.").

chill the exercise of First Amendment rights."[236] As in *P.H.E.*, James's civil action "is said to be part of a larger strategy of multiple [regulatory actions] designed in part to drain [the NRA's] financial resources."[237] And, also like *P.H.E.*, "the government's motive here is . . . to burden the appellants with massive costs of defending themselves so as to drive them out of business, even though it is conceded that" the NRA's advocacy "is protected by the First Amendment" against any sort of regulatory reprisals.[238]

This entitles the NRA to pursue a First Amendment retaliation claim as an "adequate avenue[] of redress."[239]

F. The Lower Court's Opinion Provides a Legal Roadmap That Would Allow State Officials to Destroy Advocacy Organizations Whose Speech They Dislike and, In So Doing, Sharply Breaks With Established Law

Finally, the lower court's opinion should be reversed because it draws a roadmap for how officials can abuse state power to destroy the ability for non-profits to advocate for positions disfavored by the government. That is, an official can run for office with the stated aim of taking adverse action against a disfavored speaker out of animus for its advocacy, launch an investigation, and then use the investigation to allege some kind of technical violation that provides a basis for an

[236] *P.H.E., Inc*., 965 F.2d at 855.
[237] *Id*. at 854.
[238] *Id*.
[239] *Lozman*, 138 S. Ct. at 1954.

onerous, and expensive civil-enforcement action that has the intent and effect of wasting the speaker's assets and tying up its resources. Indeed, the Answer pleads just this situation.[240]

Pursuant to the lower court's decision, so long as the targeted entity has committed any sort of technical infraction whatsoever, it would have no redress whatsoever for the blatant violation of its First Amendment rights.[241] This would mark a decisive and dangerous break with both federal[242] and New York[243] law.

Under established law, where the government seeks to "use the agents and instrumentalities of law enforcement to curb speech protected by the First Amendment" via a "campaign of harassment and intimidation," as is alleged here, injunctive and declaratory relief are available to stop the unconstitutional campaign.[244]

For example, in *Bantam Books*, the Supreme Court squarely held that First Amendment requires courts "to look through forms and recognize that informal censorship may sufficiently inhibit [speech] to warrant injunctive relief."[245] Just as New York cannot ban the NRA directly, it may not covertly attempt to do so

---

[240] R. Vol. 1 at 74.7–9; 74.144–41, 74.170.
[241] *Id*. at 9.
[242] *P.H.E., Inc*., 965 F.2d at 854.
[243] *303 W. 42nd St. Corp.*, 46 N.Y.2d at 694.
[244] *P.H.E., Inc*., 965 F.2d at 856 (citing *Dombrowski v. Pfister*, 380 U.S. 479 (1975) and *Bantam Books, Inc.*, 372 U.S. 58).
[245] *Bantam Books, Inc.*, 372 U.S.at 67.

indirectly by "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation."[246] Thus, where New York "deliberately set[s] about to achieve the suppression of [advocacy groups] deemed 'objectionable' and succeed[s] in its aim," the First Amendment is violated—regardless of the means.[247]

Here, James's suit, orchestrated pursuant to an effort by New York officials to retaliate against the NRA for its advocacy,[248] has thrown the NRA into financial jeopardy and imperils its survival.[249]

The consequences of upholding the lower court's ruling would be dire. The party here happens to be the NRA, but, in another city or state, it could just as easily be the NAACP, the ACLU, or NARAL. In this polarized era, opening the floodgates for state officials to launch politically-motivated investigations and dissolution suits against non-profits, based on advocacy those officials dislike, would be disastrous. It would paralyze the free flow of information and allow state officials to leverage their broad investigative and civil enforcement powers to crush advocacy groups whose speech they dislike.

IV. THE LOWER COURT IMPROPERLY DISMISSES THE NRA'S SELECTIVE ENFORCEMENT COUNTERCLAIMS

With respect to the NRA's Fifth and Sixth Counterclaims for selective

[246] *Id*.
[247] *Id*.
[248] *Id*. at 74.145–51.
[249] R. Vol. 1 at 74.170-71.

enforcement in violation of the constitutional right to equal protection, the lower court erroneously finds that "[t]he counterclaims also fail to allege that the NRA was treated differently from similarly situated charitable organizations due to impermissible considerations."[250]

The decision below ignores the NRA's detailed allegations that the NYAG had repeatedly failed to seek dissolution against non-profit entities whose executives engaged in far more wide-reaching misconduct than the NRA's.[251] The most logical inference was that the NYAG's avowed animus towards the NRA and her repeated pledges to dissolve the NRA in retaliation for its advocacy led her to open a pretextual investigation with the predetermined aim of seek an extraordinarily punitive remedy to which she was not legally entitled.[252]

Both the U.S. and New York Constitutions prohibit the government from applying or enforcing a valid law "with an evil eye and an unequal hand."[253] Such behavior "taints the integrity of the legal process to the degree that no court should lend itself to adjudicate the merits of the enforcement action," "even though the party . . . may well have been guilty of violating the law."[254] Discrimination based on political speech and advocacy is such an impermissible standard. If "conscious,

[250] *Id.* at 12.
[251] *Id.*at 74.157.
[252] *Id*. at 74.142–43.
[253] *See Yick Wo*, 118 U.S. at 373–74.
[254] 303 W. 42nd St. Corp., 6 N.Y.2d at 694.

intentional discrimination" exists, then "the defendant will be entitled to a dismissal of the prosecution as a matter of law."[255]

The NRA's Answer pleads in depth that the NYAG's decision to seek seizure of all of the NRA's assets and annul its existence constitutes impermissible selective enforcement of the New York Not-for-Profit Corporation Law by James.[256] Here, both James's documented animus against the NRA and more than 20 years' worth of action by the NYAG and other state attorneys general against non-profits make clear that the NYAG brought her dissolution suit to punish a political enemy and stifle its speech.[257] The record establishing James's vitriolic dislike of the NRA's advocacy and desire to shut it down is extensive.[258] While proof of intent in these matters is often hard for a defendant to come by, here it permeates the public record.

In addition to the government official's own statements, proof of intent may also be found by a "showing of a grossly disproportionate incidence of nonenforcement against others similarly situated in all relevant respects save for" the impermissible motive.[259]

Relevant here is the fact that the NYAG has never sought dissolution of a non-profit corporation based solely on alleged self-dealing or related-party transactions

[255] *People v. Utica Daw's Drug Co.*, 225 N.Y.S.2d 128, 135 (4th Dept. 1962).
[256] *See* R. Vol. 1 at 74.152–61.
[257] *Id*.
[258] *Id*. at 74.141–48.
[259] *303 W. 42nd St. Corp.*, 46 N.Y.2d at 686.

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.

For example, the NRA's Answer lists numerous instances where the NYAG did not seek dissolution in cases far more egregious than the isolated instances of self-dealing charged against the NRA. [260] The NRA comprehensively pleads these and other facts showing that NYAG's pursuit of dissolution and asset-seizure against NRA is a dramatic break from not just its own past practice, but that of every other state.[261] The lower court was required to accept the truth of those allegations in evaluating the NYAG's motion to dismiss.

Despite this, the decision below finds that the NRA "fail[ed] to allege that the NRA was treated differently from similarly situated charitable organizations due to impermissible considerations."[262] This analysis hearkens back to the deficiencies in the lower court's analysis of the First Amendment claims. Once again, the lower court looks past the NYAG's public statements clearly establishing her own animus and demands that the NRA carry a burden the law does not require it to bear.[263] And the lower court refuses to believe the NRA's well-pleaded allegation that the remedy

[260] R. Vol. 1 at 74.152–60.
[261] *Id*.
[262] *Id*. at 16.
[263] *See id.* at 12–13.

sought by the NYAG—complete dissolution—differs wildly from those sought against other not-for-profits whose internal procedures required improvement.[264]

These facts, viewed in the light of the NYAG's public statements vowing to destroy NRA to punish it for its advocacy, establish a colorable claim of selective enforcement.[265]

The lower court points to the fact that it previously dismissed the dissolution causes of action.[266] But that does not matter for purposes of the NRA's selective enforcement claim. Rather, the issue is the NYAG's grossly discriminatory intent in bringing this action. That is, the question is whether the NYAG enforced the law "with an evil eye and an unequal hand"—not whether the lower court's later rulings cabined the scope of the NYAG's action.[267]

For example, in *303 W. 42nd St. Corp.*, the Court of Appeals held that a discriminatory motive so tainted the entire enforcement action that the plaintiff might seek properly seek dismissal. [268] The same result obtains here—regardless of whether the lower court subsequently dismissed the dissolution claim or not. Under *303 W. 42nd St. Corp.*, the remedy for the unconstitutional selective enforcement, if proven at trial, is dismissal of the NYAG's suit in its entirety.

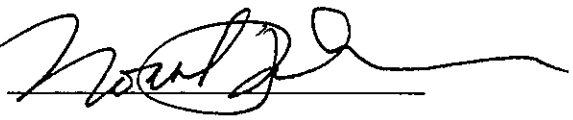
---

[264] See *id*.
[265] *See id*. at 74.141.
[266] *Id.* at 3.
[267] *Yick Wo*, 118 U.S. at 373–74.
[268] 46 N.Y.2d at 694.

CONCLUSION

The lower court's June 10, 2022, decision dismissing the NRA's counterclaims with prejudice should be reversed and remanded with instructions to deny the NYAG's Motion to Dismiss the NRA's Amended Counterclaims.

Dated: March 13, 2023

By: 

BREWER, ATTORNEYS & COUNSELORS
William A. Brewer III
Svetlana M. Eisenberg
Noah Peters
750 Lexington Avenue, 14th Floor
New York, NY 10022
(212)-489-1400

ATTORNEYS FOR THE NATIONAL RIFLE ASSOCIATION OF AMERICA

PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14 Point

Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this Statement is 13,964.