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June 20, 2024

BY ECF
Honorable Anne M. Nardacci
United States District Court
Northern District of New York
James T. Foley U.S. Courthouse
445 Broadway, First Floor
Albany, New York 12207

Re: *NRA v. Cuomo, et al.*, No. 18-cv-00566 (TJM)(CFH))

Dear Judge Nardacci:

We represent defendant Andrew M. Cuomo ("Governor Cuomo") in this action and write in response to the June 14, 2024 letter from counsel for plaintiff the National Rifle Association of America ("NRA"), Dkt. No. 401, requesting that the Court vacate the discovery stay ordered on January 18, 2022 and September 15, 2023. Dkt. Nos. 360 & 391.

The Court should adhere to Judge McAvoy's two previous, well-reasoned decisions staying discovery in this action and deny the NRA's application. The Supreme Court's recent decision in *National Rifle Association of America v. Vullo*, 144 S.Ct. 1316 (2024), finding only that the NRA sufficiently alleged a First Amendment claim under Federal Rule of Civil Procedure 12(b)(6), does not alter the analysis. The Second Circuit's earlier determination that defendant Maria Vullo ("Vullo") is entitled to qualified immunity remains the law of the case and, for all of the reasons previously articulated by Judge McAvoy, the discovery stay should remain in place until (i) the Second Circuit has had the opportunity, on remand from the Supreme Court, to review its qualified immunity ruling, and (ii) this Court determines Governor Cuomo's motion for judgment on the pleadings.

I. Judge McAvoy's Stay Orders

On January 18, 2022, following the denial of Vullo's motion to dismiss on qualified

immunity grounds, Judge McAvoy granted her motion to stay all discovery in this action, and held that discovery was stayed "during the pendency of Defendant Vullo's qualified immunity appeal." Dkt. No. 360 at 11-12. In that opinion, the Court observed that it was appropriate to impose a global stay, which applied to "the entire case, including discovery relative to the claims against Defendant Cuomo." *Id*. at 10-11.

On September 22, 2022, the Second Circuit reversed Judge McAvoy's denial of Vullo's motion to dismiss the NRA's Second Amended Complaint ("SAC") and remanded the case, directing entry of judgment for Vullo. The Second Circuit concluded, as a matter of law, that Vullo had engaged in "permissible government speech," and therefore, the SAC did not plausibly allege a First Amendment violation. *Nat'l Rifle Ass'n of Am. v. Vullo*, 49 F.4th 700, 719 (2d Cir. 2022). Further, even assuming that the NRA sufficiently pleaded a constitutional violation, the Second Circuit determined that Vullo was "nonetheless entitled to qualified immunity because the law was not clearly established and any First Amendment violation would not have been apparent to a reasonable official at the time." *Id.*

On February 21, 2023, the NRA filed a motion requesting that the Court lift the discovery stay and compel Governor Cuomo to produce "responsive, non-privileged documents that the NRA requested four years ago, and allow the NRA to depose Cuomo, Vullo, and Lacewell." Dkt. No. 377 at 18. On March 20, 2023, Governor Cuomo opposed the NRA's stay motion and also moved for judgment on the pleadings based on the Second Circuit's *Vullo* decision. On September 15, 2023, Judge McAvoy denied the NRA's motion, holding "that the discovery stay will continue until such time as the Court resolves Cuomo's dismissal motion." Dkt. No. 391 at 14.

The considerations counseling the Court to maintain the discovery stay still exist and the NRA has not demonstrated good cause to vacate the stay.[1]

II. A Stay of Discovery Is Appropriate While the Second Circuit Resolves the Qualified Immunity Question in the *Vullo* Action and This Court Considers Governor Cuomo's Qualified Immunity Defense

Under Federal Rule of Civil Procedure 26(c), this Court has discretion to stay discovery "for good cause." Fed. R. Civ. P. 26(c)(1). Maintaining the current stay of discovery is

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[1] In addition to the reasons described in this response, the NRA's letter request is procedurally improper under this Court's Local Rules of Practice. Pursuant to L.R. 37.1, in order for a party to make "any discovery motion pursuant to Rules 26 through 37 of the Federal Rules of Civil Procedure," the moving party is required, in part, to: (i) "make good faith efforts . . . to resolve or reduce all differences relating to discovery prior to seeking court intervention"; (ii) "confer in detail with the opposing party concerning the discovery issues between them in a good faith effort to eliminate or reduce the area of controversy and to arrive at a mutually satisfactory resolution"; and (iii) "[i]f the parties' conference does not fully resolve the discovery issues, . . . request a court conference with the assigned Magistrate Judge." The NRA ignored all three of these requirements.

appropriate while this Court considers Governor Cuomo's pending motion for judgment on the pleadings, which relies, in part, on the assertion of qualified immunity. Despite the NRA's assertions, Supreme Court precedent clearly states that public-official litigants, like Governor Cuomo, invoking the protection of qualified immunity should be spared the burdens of discovery while the issue of immunity is pending.

As Judge McAvoy previously recognized, "Cuomo's purported immunity from the NRA's claims is not just a 'defense to liability,' but 'an immunity from suit.'" Dkt. No. 391 at 5 (citing *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)). Thus, the Court observed that "[t]he Supreme Court has instructed that discovery should not be allowed pending the resolution of an immunity question." *Id*. (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) ("Until [the] threshold immunity question is resolved, discovery should not be allowed."); *Behrens v. Pellettier*, 516 U.S. 299, 308 (1996) (qualified immunity provides protection "not merely to avoid standing trial, but also to avoid the burdens of such pretrial matters as discovery") *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998)("[I]f the defendant does plead the immunity defense, the district court should resolve that threshold question before permitting discovery."); *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including avoidance of disruptive discovery.") (internal quotation marks and citation omitted); *Gillard v. Rovelli*, 2013 WL 5503317, at *15 (N.D.N.Y. Sept. 30, 2013) (quoting *Dabney v. Maddock*, No.10-CV-0519 (GTS/DEP), 2011 WL 7479164, at *11 (N.D.N.Y. Nov. 29, 2011); *see also* Dkt. No. 360 at 7 ("Generally speaking, discovery should not be allowed pending the resolution of an immunity question.")

Contrary to the NRA's assertions, Governor Cuomo's qualified immunity defense has "merit." The Second Circuit previously held that "*even assuming* the NRA sufficiently pleaded that Vullo engaged in unconstitutionally threatening or coercive conduct, . . . Vullo is nonetheless entitled to qualified immunity because the law was not clearly established and any First Amendment violation would not have been apparent to a reasonable official at the time." *Vullo*, 49 F.4th at 719 (emphasis added); *see also D.C. v. Wesby*, 583 U.S. 48, 63 (2018) (stating that "[t]he 'clearly established' standard . . . requires that the legal principle clearly prohibit the officer's conduct in the *particular circumstances* before him") (emphasis added); *Saucier v. Katz*, 533 U.S. 194, 195 (2001) ("The relevant, dispositive inquiry is whether it would be clear to a reasonable officer that the conduct was unlawful in *the situation he confronted*.") (emphasis added); *Zieper v. Metzinger*, 474 F.3d 60, 68 (2d Cir. 2007) (finding that although the plaintiff sufficiently alleged a First Amendment violation, defendants were entitled to qualified immunity because "pre-existing law would not have made apparent to a reasonable officer that defendants' actions crossed the line between an 'attempt[ ] to convince and [an] attempt[ ] to coerce'").

The Second Circuit's qualified immunity holding in *Vullo* remains the law of the case. In vacating the Second Circuit's judgment, the Supreme Court addressed only whether the NRA sufficiently alleged a First Amendment claim against Vullo and *did not* address the Second Circuit's holding that Vullo was entitled to qualified immunity. *Vullo*, 144 S.Ct. at 1325 ("This

Court granted certiorari on only the first question presented whether the complaint states a First Amendment claim against Vullo.") Indeed, the Supreme Court stated that the Second Circuit, on remand, "is free to reconsider whether Vullo is entitled to qualified immunity," *id*. at 1332 n. 7, but expressed no opinion on the issue. Consequently, as the NRA's claims against Governor Cuomo and Vullo are premised "on conduct alleged to have occurred within the general limited time period and involving a number of overlapping facts," Dkt. No. 360 at 10, if the Second Circuit reaffirms its holding that Vullo is entitled to qualified immunity, that finding will be dispositive of Governor Cuomo's qualified immunity defense and result in the SAC being *dismissed in its entirety*.

III. The NRA Has Not Demonstrated Good Cause to Lift the Stay

The NRA, yet again, has failed to demonstrate good cause to vacate the existing stay. Given Governor Cuomo's motion for judgment on the pleadings and the Second Circuit's pending ruling, on remand, whether to adhere to its prior determination that Vullo is entitled to qualified immunity, lifting the stay is both premature and antithetical to this case proceeding "efficiently and with full participation of the appropriate parties at the appropriate time." Dkt. No. 360 at 10-11 ("There is merit to Defendant Vullo's concern that no matter how narrowly the NRA may tailor discovery as to Defendant Cuomo, Defendant Vullo would need to participate to protect her rights on the chance the appeal is denied, thereby defeating her putative qualified immunity rights.").

In ordering a global stay of discovery, Judge McAvoy observed—in light of the overlapping factual and legal issues between the NRA's claims against Governor Cuomo and Vullo—that if discovery were allowed to proceed against Governor Cuomo without "Vullo's participation but . . . Vullo's appeal [was] denied, discovery would have to be re-conducted as to Defendant Vullo or she could seek to preclude the NRA from using against her the discovery it received without her participation." Dkt. No. 360 at 11. Similarly, if Vullo's appeal was "successful while a full discovery stay is in place, the Court would need to assess what limited discovery would proceed," and whether Vullo's participation was necessary. *Id*.

These considerations remain and counsel that the discovery stay be maintained. If the Court, however, vacates the stay before (i) it resolves Governor Cuomo's qualified immunity defense and (ii) the Second Circuit reiterates that Vullo is entitled to qualified immunity, Vullo may still need to participate in discovery "to protect her rights" in this action, rendering the qualified immunity protection meaningless. Likewise, if the stay is vacated, and the Second Circuit holds that Vullo is not entitled to qualified immunity, this Court will be required to reconduct discovery as to Vullo, which is antithetical to the efficient use of the Court's and parties' resources.

Finally, although the NRA asserts that discovery is necessary to address Governor Cuomo's qualified immunity defense, Judge McAvoy already has rejected this argument, stating

that because Governor Cuomo's motion was brought under Federal Rule of Civil Procedure 12(c), that motion "is resolved based upon the allegations in the SAC" and "[n]o additional information is necessary to adjudicate . . . Cuomo's claimed qualified immunity." Dkt. No. 391 at 14; *see also Garcia v. Does*, 779 F.3d 84, 97 (2d Cir. 2015) ("The Supreme Court has made clear that qualified immunity *can* be established by the facts alleged in a complaint, and indeed, because qualified immunity protects officials not merely from liability but from litigation, that issue should be resolved when possible on a motion to dismiss, 'before the commencement of discovery[.]'") (emphasis in original) (citations omitted). Similarly, while the NRA claims that discovery is "warranted because the NRA's claims for injunctive relief do not depend on Cuomo's entitlement to qualified immunity," this Court has *already dismissed* the NRA's claims for injunctive and declaratory relief "as barred by the Eleventh Amendment" sovereign immunity. Dkt. No. 322 at 32.[2] That holding regarding the NRA's claims for injunctive and declaratory relief remains the law of the case and is not impacted by the Supreme Court's *Vullo* opinion.

Accordingly, the NRA has not demonstrated good cause to lift the existing stay and maintaining the status quo "will allow the case to proceed efficiently and with full participation of the appropriate parties at the appropriate time." Dkt. No. 360 at 11.

IV. The NRA Is Not Prejudiced by Extending the Stay

The NRA is not prejudiced by extending the discovery stay pending the resolution of (i) the Second Circuit's qualified immunity determination in the *Vullo* action and (ii) Governor Cuomo's motion for judgment on the pleadings. Although the NRA argues that the "Supreme Court's opinion [has] transformed the equities surrounding the stay" and that "the stay in the current case is no longer justified" in light of that opinion, Dkt. No. 401 at 5, that position is a misrepresentation of the Supreme Court's opinion and its effect on the Second Circuit's prior qualified immunity determination. As previously noted, the Supreme Court granted certiorari only on the question of whether the NRA sufficiently alleged a First Amendment claim against Vullo *and did not address* whether Vullo is entitled to qualified immunity.

The NRA also repeats the already rejected argument that the discovery stay is prejudicial given the time that "has passed" and the "enormous damage" the NRA continues to suffer "as a result of the [allegedly] unconstitutional scheme." Dkt. No. 401 at 5. Governor Cuomo, however, is not requesting the indefinite stay of discovery. Instead, he requests that this Court maintain the stay while (i) the Second Circuit resolves the qualified immunity issue in the *Vullo*

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[2] This letter is submitted solely on Governor Cuomo's behalf and does not purport to represent DFS's position on this matter. Nonetheless, we highlight that (1) in dismissing the NRA's claims for injunctive and declaratory relief, Judge McAvoy noted that the NRA itself "conceded that DFS is not a person subject to suit under § 1983," *id.*, and (2) in over *three years* since Judge McAvoy dismissed those claims, the NRA has *not moved* for reconsideration of that opinion.

appeal, given the similarity in the claims against Governor Cuomo and Vullo, and (ii) this Court rules on Governor Cuomo's pending motion for judgment on the pleadings.

Moreover, to the extent that the NRA claims prejudice due to years of litigation, as Judge McAvoy recognized less than a year ago, "some of that delay is attributable to its own actions" over the course of this litigation. Dkt. No. 391 at 10. Any extension of the stay of discovery would be limited in time and not prejudice the NRA. Notably, the NRA has failed to identify any discovery matters that are so time-sensitive that maintaining the stay would cause irreparable harm. Although there is a minimal risk of lost documentation and fading witness recollections, the potential prejudice to the NRA is more than outweighed by the fact that Governor Cuomo's immunity defense would result in him being dismissed from the case entirely.

V. Lifting the Stay Would Irreparably Harm Governor Cuomo

Here, an order lifting the stay would irreparably harm Governor Cuomo. As Judge McAvoy previously observed, "the Supreme Court has instructed that discovery should not be allowed pending the resolution of an immunity question." Dkt. No. 391 at 5 (citing cases). Consequently, the Court found that "because there is the potential that Cuomo could be required to engage in unnecessary discovery, he has demonstrated that there is some potential prejudice to him," which weighed "against lifting the stay." *Id*. at 13.

The same equitable considerations identified by Judge McAvoy are still present in this case. As an initial matter, vacating the stay would irreparably harm Govermor Cuomo as such an order would strip him of his asserted "qualified immunity protections" and subject him to the costs and burdens of discovery. Dkt. No. 360 at 9. Moreover, if the Second Circuit adheres to its holding that Vullo is entitled to qualified immunity, (i) the Second Circuit's reasoning likely will be dispositive of Governor Cuomo's pending motion for judgment on the pleadings and (ii) consequently, the SAC will be dismissed *in its entirety*. Therefore, granting the NRA's request to vacate the stay would force Governor Cuomo to engage in discovery relating to claims that may be precluded based on the Second Circuit's *Vullo* ruling. Under these circumstances, discovery should remain stayed.

VI. A Stay of Discovery While Both Governor Cuomo and Vullo's Immunity Defense Is Pending Is in the Public Interest

Finally, extending the stay is undoubtedly in the public interest. The Second Circuit has observed that "[t]he doctrine [of qualified immunity] is intended to strike a fair balance between (1) the need to provide a realistic avenue for vindication of constitutional guarantees, and (2) the need to protect public officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Jemmott v. Coughlin*, 85 F.3d 61, 66 (2d Cir. 1996) (interior quotation marks and citations omitted).

The public interest is undoubtedly advanced when courts vigorously safeguard qualified immunity's protections for public-official litigants sued because of their government service. If the immunity protection is not protected, there is a real risk that public officials will be unduly hesitant in engaging in "the vigorous exercise of official authority," *id*. at 66, if they are subjected to harassment and burdensome discovery requests while in office or, as in Governor Cuomo's case, after that official has left his position. Thus, this factor weighs in favor of extending the stay and denying the NRA's letter motion.

For all of the foregoing reasons, the NRA's application should be denied.

Respectfully yours,

/s/ Edward M. Spiro

Edward M. Spiro

cc: All counsel (by ECF)