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

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,	§	
	§	**INDEX NO. 451625/2020**
Plaintiff,	§	
v.	§	
THE NATIONAL RIFLE ASSOCIATION OF AMERICA, WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,	§	
Defendants.	§	

THE NRA'S REMEDIAL-PHASE TRIAL BRIEF

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I. PRELIMINARY STATEMENT

Based on jury findings that considered only the National Rifle Association's ("NRA" or "Association") distant past, the government seeks unprecedented relief that would impair the Association's future. Despite the NRA's external auditor's special-procedures examination, leadership committed to universal compliance, an invigorated Audit Committee, and the addition of an independent compliance function, the New York Attorney General ("NYAG") demands the expensive, redundant appointment of a compliance monitor and "governance expert," as well as an unconstitutional bar on solicitation of funds in New York. *See* NYSCEF 646 (Second Amended Complaint) ["SAC"] ¶¶ 643, 704. Apart from the government's paid experts, every witness with personal knowledge of the internal workings of the Association today concurs that further state intrusion poses a grave, needless threat to the NRA's recovery. The required "balancing of the equities," *State v. Fine*, 72 N.Y.2d 967, 969 (1988), urges the Court to heed their testimony, and deny any relief against the NRA, for several reasons.

First, the jury's limited verdict fails to justify the NYAG's sweeping request for relief. The jury found unspecified instances of "improper administration" and "false filings" dating from anywhere from over two to eight years ago, along with three related party transactions (each terminated years ago) that had not been ratified, and failures to oversee compliance with a whistleblower policy that has now been thoroughly revised and is overseen by the NRA's Chief Compliance Officer, Robert Mensinger, hired in 2023. *See* NYSCEF 3212 (Verdict Sheet).

Second, the NYAG's proposed relief is unwarranted given the NRA's commitment to good governance. Individual defendants LaPierre and Phillips are no longer with the NRA; Powell was fired; and Frazer was removed as General Counsel. *See* Affirmation of Noah Peters, dated July 1,

2024, Ex. 1 [Hamlin Depo. 75:19-23].[1] The NRA and NYAG's governance experts agree that LaPierre's departure represents the most significant governance change at the NRA in many decades. Ex. 2 [Kurtz Depo. 108:7-109:11, 115:11-116:7, 129:18-130:21]; Ex. 3 [Tenenbaum Depo. 132:6-10; 133:11-16].

At its May 2024 Annual Meeting, the NRA elected a new Executive Vice President/CEO (Doug Hamlin) and Board leadership (President Bob Barr and Vice Presidents Bill Bachenberg and Mark Vaughan)—all strongly committed to good governance. Ex. 7 (Barr committing to "[n]ever tolerate unethical behavior anywhere within the Association"); Ex. 8. The NRA also reelected a whistleblower and "champion of compliance," Sonya Rowling, as Treasurer/Chief Financial Officer. *In re Nat'l Rifle Ass'n of Am.*, 628 B.R. 262, 284 (Bankr. N.D. Tex. 2021). And the NRA elected an experienced and credentialed Chief Compliance Officer, Mensinger, who reports directly to the Board. Ex. 5 [Mensinger May 21 Depo. 24:17-25:19]; Ex. 10 [Bachenberg Depo. 132:11–133:4] (noting Mensinger's "impeccable pedigree, resume" and that he "is untouchable in terms of integrity").

In sum, the NRA's current leadership is committed to continuing to strengthen the NRA's internal controls. Ex. 83 [Trial Tr. 3648-3655 (Plotts) (the NRA's auditor, Aprio, conducted a thorough vetting process in 2019 and found NRA then-leadership to be "very transparent," "genuine" and "adamant" about the need for "tight internal controls"); Ex. 10 [Bachenberg Depo. 81:4-82:10] (new Board leadership pledged to continue the course correction that began in 2018).

Further, the NRA performed a thorough risk assessment that sets forth tight controls corresponding to each of the areas raised by the NYAG's Complaint. *See* Ex. 11. Its internal control changes include: a new whistleblower policy overseen by the Chief Compliance Officer;

[1] All citations to "Ex." refer to exhibits to the Peters Affirmation, filed with this motion.

operational changes, including revamped accounts-payable and tax-filing processes and ending employee credit cards; multiple layers of regular controls testing (including by independent internal and external auditors); and the termination (or, in the case of MMP significant restructuring) of **every** contractual relationship at issue in the liability phase of the trial. As Bachenberg testified, the NRA's commitment to compliance is "just unbelievable" and compliance "is just running through [the staff's] blood now." Ex. 10 [Bachenberg Depo. 148:23-149:12].

Third, the NYAG's proposed relief is unjustified given the devastating costs it would impose on the NRA and the lack of any discernible benefit. Notably, the New York law requires a cost-benefit analysis in determining the propriety of a mandatory injunction, such as that sought by the NYAG. *Medvin v. Grauer*, 46 A.D.2d 912, 912 (2d Dep't 1974) (in determining the propriety of a mandatory injunction, court must "weigh the conflicting considerations of benefit to the plaintiff and harm to the defendant which would follow the granting of such a drastic remedy").

In addition to the direct costs of a monitor and staff, which would be borne by the NRA, the imposition of a monitor would deter donors and members at a time when the NRA is already experiencing financial challenges as a result of the NYAG's lawsuit. Ex. 1 [Hamlin Depo. 141:14-142:1] ("If we get a monitor, it's devastating. The members aren't going to come back because it shows distrust, in my opinion."); Ex. 15 [Schropp Depo. 9:16–23, 24:25–25:22]; Ex. 16 [Commerford Depo. 12:14–13:25]; Ex. 17 [Rowling Depo. 92:12–93:2]. And there would be no concrete benefit to a monitorship. The NYAG's expert on monitorships was unable to point to any function a monitor would be able to perform that could not be performed by the NRA's Chief Compliance Officer. Ex. 18 [Frank Depo. 335:12–336:15]. As NRA Board Member Rocky Marshall stated, "we have a monitor in place, a really good one. His name is Bob Mensinger. And

in my opinion, there's no reason to have two monitors monitoring the NRA." Ex. 19 [Marshall Depo. 64:11-65:11].

Fourth, the NYAG's proposed relief would raise substantial and unprecedented First Amendment concerns by curtailing the NRA's ability to govern itself and advocate for Second Amendment rights free from government oversight. Ex. 16 [Commerford Depo 12:14-13:25, 23:4-25:12, 47:19-51:11, 93:16-94:16, 112:4-23] (a monitor imposed by a New York court would be perceived with distrust by NRA members, given their skepticism of the New York government and privacy concerns); Ex. 20 [Ector Depo. 147:16-148:9] (a monitor could "signal to people that we have the government of all things running a gun rights organization"); Ex. 10 [Bachenberg Depo. 131:25-132:10] ("any connotation of a monitor would be detrimental to our members and donors" as it "reinforces that we . . . can't be trusted"). Notably, the NYAG is unable to point to a single previous instance of a compliance monitor imposed on an advocacy group over its objection. Ex. 18 [Frank Depo. 54:14–21]; Ex. 21 [Hines Depo. 19:5–16]. Compliance monitors are typically only implemented as a term of negotiated settlement agreements, and the NYAG's own expert has never heard of a monitor being imposed upon a private party over its objection. Ex. 18 [Frank Depo. 135:7–16].

In sum, the NYAG cannot show grounds for the intrusive, forward-looking equitable relief it seeks.

II. ARGUMENT

A. Equitable Relief Requires Proof by the NYAG That Violations Found by the Jury Continue or Will Reoccur—and Must Be Tailored to Redress the Same.

A court of equity "has an obligation to go no further than absolutely necessary to protect the rights of complaining parties." *Antinelli v. Toner*, 74 A.D.2d 996, 997 (1st Dep't 1980). Where, as here, the relief sought is in the "drastic" nature of a permanent, mandatory injunction, the

plaintiff must show "that [1] there was a violation of a right ***presently occurring, or threatened and imminent***, [2] that he or she has no adequate remedy at law, [3] that serious and irreparable harm will result absent the injunction, and [4] that the equities are balanced in his or her favor." *Caruso v. Bumgarner*, 120 A.D.3d 1174, 1175 (2d Dep't 2014) (emphasis added); *see also People v. Lutheran Care Network, Inc.*, 167 A.D.3d 1281, 1283 (3d Dep't 2018) (denying NYAG's demand for broad equitable relief requiring nonprofit to implement a conflict-of-interest policy in compliance with N-PCL § 715-a as moot where defendant already adopted required policies); *In re New York Methodist Hosp.*, 25 Misc. 3d 648, 652–53 (Kings Cty. Sup. Ct. 2009) (A mandatory injunction, which "demand[s] that a person perform certain acts" instead of merely refraining from certain behaviors, is "uncommon and considered a drastic remedy which should only be utilized where compelling circumstances require it.").

Much of the relief the NYAG seeks—a compliance monitor and "governance expert," rescission of related party transactions, and removal of unspecified Board members—is in the nature of a mandatory injunction. *See Hester Indus., Inc. v. Tyson Foods, Inc.*, 160 F.3d 911, 916 (2d Cir. 1998) (order requiring party to comply with a settlement agreement "is tantamount to a mandatory injunction").

Critically, neither the jury's verdict nor the subsequent discovery record establishes the kind of "compelling circumstances," involving continuing or imminent violations of law, that mandatory prospective equitable relief requires. As to the NRA, the jury found that, at some point between March 20, 2014, and May 2, 2022, "the NRA failed to properly administer the organization and its assets." NYSCEF 3212 (Verdict Sheet) at 2. It found three related party transactions were not properly ratified by the NRA Board, with one of the violations (Phillips's post-employment contract) resulting in no damage to the NRA. *Id.* at 8–9, 11–13. And it found

that at least one of the NRA's annual CHAR500 filings, which include the NRA's IRS Form 990, contained a statement or omission that was materially false. *Id*. at 16. These narrow findings do not justify sweeping, intrusive relief against the NRA—such as a compliance monitor, governance expert, and bar on soliciting funds in New York—that would cost it millions in direct costs and lost revenue and impinge on the NRA's First Amendment rights to govern itself and solicit funds. *See* Ex. 22 [Sullivan Depo. 215:11-220:2, 221:18-226:7, 248:18-256:17]; Ex. 23 [Sullivan & Blacker May 24 Supplemental Report pp. 24-50]; Ex. 24 [Sullivan & Blacker June 4 Surrebuttal Report pp. 32-52].

B. <u>The NYAG's Proposed Relief Is Unwarranted.</u>

The NRA's leadership and control environment are drastically different from the 2014-2018 period. The NRA's controls are robust and effective both in their design and operation, going far beyond what is standard in the non-profit field. *See* Ex. 25 [Lerner Depo. 158:4–23, 195:8–196:10, 216:8–25]; Ex. 81 [Trial Tr. 3600:17–3604:10, 3611:24–25, 3617:10–11, 3620:15–17 (Lerner)]. Indeed, the NRA has implemented virtually all of the reforms suggested by NYAG governance expert Tenenbaum in his 2022 expert report as part of "a responsible course correction," and it has terminated or (in the case of MMP) substantially restructured each of the vendor relationships cited in Eric Hines's 2022 expert report as having "fraud risk indicators." Ex. 26 [Tenenbaum Expert Report (Sept. 16, 2022) pp. 59-63]; Hines Expert Report (Sept. 16, 2022) pp. 38-174 [filed as NYSCEF 1683].[2]

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[2] U.S. Department of Justice ("DOJ") Guidelines, cited by the NYAG's experts, are not applicable in this case. They are not evaluated by courts in deciding whether to impose monitors, but instead by DOJ prosecutors in determining whether to seek a monitor <u>in criminal negotiations</u>. *See* Ex. 18 [Frank Depo. 213:9-215:7]. Nonetheless, it is notable that these factors strongly weigh against the imposition of a monitor in this case. Specifically, DOJ guidelines look to, *inter alia*, whether "misconduct occurred under different corporate leadership or within a compliance environment that no longer exists within the company;" "[w]hether, at the time of the resolution

1. **<u>The NRA's Leadership is Committed to Compliance.</u>**

In its Complaint, expert reports, and at trial, the NYAG focused heavily on the actions and inactions of LaPierre as Executive Vice President/CEO. *See* SAC ¶ 2 ("[f]or nearly three decades, Wayne LaPierre has served as the chief executive officer of the NRA and has exploited the organization for his financial benefit, and the benefit of a close circle of NRA staff, board members, and vendors."); Tenenbaum Report pp. 29-34 ("the NRA has acted at times as a 'cult of personality' under the leadership of LaPierre"); Ex. 86 [Trial Tr. 4637:5-4639:22 (NYAG Summation)] ("LaPierre created this culture of corruption within the NRA"). The NRA and NYAG's governance experts agree: the departure of LaPierre marks the most significant governance change at the NRA in many decades. Ex. 2 [Kurtz Depo. 108:7-109:11, 115:11-116:7, 129:18-130:21]; Ex. 3 [Tenenbaum Depo. 132:6-10, 133:11-16].

Both the NRA and LaPierre have made clear that LaPierre is not and will not be involved with the NRA in any capacity. Ex. 28 [LaPierre Depo. 52:7–53:4]; Ex. 29. In addition, individual defendants Wilson Phillips and Josh Powell left the NRA years ago. SAC ¶¶ 21, 22.

Thus, the NRA's leadership shift since the time period considered by the jury is "night and day." Ex. 12 [Mills Depo. 132:15-16]. At the May 2024 Annual Meeting, the NRA elected Hamlin as its Executive Vice President/CEO, reelected Rowling as Treasurer/CFO, and elected Mensinger

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and after a thorough risk assessment, the corporation has implemented an effective compliance program and sufficient internal controls to detect and prevent similar misconduct in the future"; "[w]hether, at the time of the resolution, the corporation has adequately tested its compliance program and internal controls to demonstrate that they would likely detect and prevent similar misconduct in the future"; whether the entity "took adequate investigative or remedial measures . . . including . . . the termination of business relationships and practices that contributed to" the misconduct "and discipline or termination of personnel involved"; and "[w]hether, at the time of the resolution, the corporation's risk profile has substantially changed, such that the risk of recurrence of the misconduct is minimal or nonexistent." DOJ Revised Memorandum on Selection of Monitors in Criminal Division Matters dated March 1, 2023 (the "Polite Memo") at 2-3. All of these factors weigh heavily against imposition of a monitor here.

as Chief Compliance Officer. Ex. 5 [Mensinger May 21 Depo. 133:8-11]. It also elected new Board leadership: President Barr and Vice Presidents Bachenberg and Vaughan. *Id*. 132:23-133:7. Barr is a distinguished former U.S. Representative and federal prosecutor who possesses sterling credentials. *Id*. Ex. 3 [Tenenbaum Depo. 197:13-21]; Ex. 10 [Bachenberg Depo. 92:17-94:2] (noting Barr's credentials and that he is "a very astute individual."). Hamlin, Bachenberg and Vaughan were nominated from the floor, not by the Nominating Committee. Ex. 1 [Hamlin Depo. 43:14-44:13, 49:22-50:17]; Ex. 4 [Vaughan Depo. 32:9-34:4]. And the meeting where the Board elections were held was open to the public and marked by vigorous debate and contested votes. *Id*. Ex. 5 [Mensinger May 21 Depo. 132:18-137:25].

All new Board leaders and officers promised to continue the NRA's "course correction" and strengthen compliance and transparency at the NRA. Ex. 8; Ex. 7; Ex. 10 [Bachenberg Depo. 81:4-82:10.[3] The NRA's "tone at the top" is clear: all of its leaders are steadfast in their commitment to compliance and transparency, and in their resolution to not allow further violations.

2. **The NRA Performed a Risk Assessment that Addresses Each Area of Concern Identified in the NYAG's Complaint.**

The NRA's Treasurer and CFO, Rowling, was one of the Top Concerns whistleblowers who raised compliance issues, including those at issue in this lawsuit, to the Audit Committee. *See*

[3] Indeed, NYAG expert Tenenbaum admitted that the promises of NRA Board leadership to increase transparency duplicate his own recommendations. Ex. 3 [Tenenbaum Depo. 165:11–172:6 (Tenenbaum states that many of Barr's promises align with the recommendations that Tenenbaum makes), 190:16-192:8 (Tenenbaum admitting that it would not be a bad thing if the NRA does not reduce board size)]. And there is no warrant for the Court to order the NRA to reduce the size of its Board of Directors or make any changes to its Bylaws, and any such order would raise serious First Amendment concerns (discussed below). Ex. 10 [Bachenberg Depo. 95:13-101:9] (noting that new NRA Board members receive extensive training, that the NRA Board works well together, that a large board is essential to prevent "a faction try[ing] to come in and take over the board," that NRA Board members have a wide array of relevant skillsets and experiences, and that large boards are common for non-profits).

Ex. 79 [Trial Tr. 1174:20–1175:15 (Rowling)]; Ex 74. Rowling is a competent professional who has in-depth knowledge of the issues that gave rise to the NYAG's Complaint. *See* Ex. 83 [Trial Tr. 3654:14-3655:6 (Plotts)]. She performed a thorough risk assessment that 1) addresses in depth each area of concern raised by the NYAG's Complaint and 2) guides the NRA's controls testing. Ex. 11.[4] In addition to Mensinger, the Chief Compliance Officer, and Michael Blaz, the General Counsel, she oversees layers of policies, operating procedures, and other controls, described in detail in the Risk Assessment, designed to prevent such misconduct from happening again. *See* Ex. 81 [Trial Tr. 3592:25-3594:2 (Lerner) (a risk assessment is "a key element or key component of the COSO Framework")]; Ex. 19 [Marshall Depo. 80:13-81:16] (Marshall reviewed the Risk Assessment and it satisfied any concerns he had about the NRA's ability to safeguard its assets).[5]

3. <u>The NRA Terminated or Restructured Each of the Vendor Relationships Identified as Problematic.</u>

The NRA either terminated (or, in the case of MMP) significantly restructured **<u>every</u>**

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[4] The NYAG makes much of the fact that the NRA supposedly did not perform a "root cause analysis" of the misconduct alleged by the NYAG. But the NYAG's own expert conceded that a "full-fledged forensic investigation" into past wrongdoing is not warranted at this point, that the goal of a root cause analysis is to give the organization a sense of what went wrong, and that the risks identified in the NRA's Risk Assessment correspond with the issues in this litigation. Ex. 21 [Hines Depo. 108:4-116:8, 121:4-127:18, 253:12-255:22, 384:13-386:12]. Rowling, one of the authors of the Top Concerns memo, knows well the root causes of the prior misconduct, as does the Mensinger. *Id*. at 108:4-109:14; *see also* Ex. 19 [Marshall Depo. 73:5-24]. And multiple knowledgeable witnesses and experts have testified that a root cause analysis need not take any specific form, but merely reflect that the organization understands the cause of any failures so that it can take appropriate remedial measures. *See* Ex. 69 [Suffecool Depo. 144:16-145:25]; Ex. 25 [Lerner Depo. 50:23-55:11].

[5] Rowling's experience underscores that the misconduct did not involve "active participation of compliance personnel or the failure of compliance personnel to appropriately escalate or respond to red flags," Polite Memo. at 3; instead, Rowling and other first-line financial services employees promptly raised the issues they identified to the Audit Committee, which in turn took prompt action to address those concerns (including a top-to-bottom review of all NRA vendor relationships). *See* Ex. 78 [Trial Tr. 1127-1129 (Rowling)]; Ex. 84 [3813-31 (Erstling)].

contractual relationship at issue in the liability phase of the trial, including Ackerman McQueen, Under Wild Skies, and Associated Television. Ex. 21 [Hines Depo. 50:23–51:15, 214:15–215:17]; Ex. 32 [Plotts Depo. 229:2–13]; Ex. 33 [Blacker Depo. 130:5–11]; Ex. 22 [Sullivan Depo at 127:22-128:4]. With respect to the one vendor relationship that was not terminated (MMP), the NRA renegotiated its agreement with MMP in 2022, achieving a 46% reduction in fees. *See* Ex. 75; Ex. 3 [Tenenbaum Depo. 91:4-10]; Ex. 21 [Hines Depo. 40:10-41:12]. And it is renegotiating the MMP agreement again this year. *See* Ex. 36 [Arulanandam May 19 Depo 250:12-251:5]. The NRA also made changes in accounts payable procedures, travel and expense reporting, and procurement/contracts policies to ensure that verbal approvals of payments, management overrides and other control violations cannot happen in the future. *See* Ex. 84 [Trial Tr. 3827:11–3830:24 (Erstling)].

4. The NRA Terminated Employees Who Broke the Rules and Required Repayment of Unintended Benefits.

In addition to the sweeping leadership changes described above, the NRA terminated employees such as Millie Hallow and Chris DeWitt who violated NRA policies regarding expense reimbursements. Ex. 36 [Arulanandam May 19 Depo at 146:25–147:6]. The NRA required LaPierre and Schropp to repay benefits they received that did not comply with NRA policies. *See* Ex. 76; Ex. 77; Ex. 34; Ex. 35. The NRA also ended its practice of providing company credit cards to directors, officers, and employees. Ex. 36 [Arulanandam May 19, 2024 Depo. at 190:7–15]. It requires employees to use their own personal payment methods when incurring business expenses for reimbursement, which can then only be repaid if substantiated with documentation showing a proper business purpose and timely submission. *Id.* Thus, the type of credit-card misconduct committed by Hallow, DeWitt, and others could not happen at the NRA today.

5. The NRA Terminated All Related-Party Transactions and Requires 100% Compliance with Its Conflict-of-Interest Policy.

The NRA has a robust conflict-of-interest policy, and it now has 100% compliance with that policy. *See* Ex. 80 [Trial Tr. 2565:21-2566. (Frazer)]. The NYAG's expert, Tenenbaum, admits that the NRA's conflict-of-interest policy has adequate provisions. *See* Ex. 26 [Tenenbaum Expert Report (Sept. 16, 2022) p. 61]. The NRA terminated all the related-party transactions identified on pages 11 to 13 of the Verdict Sheet and has robust procedures to identify and analyze related-party and conflict-of-interest transactions and ensure compliance with N-PCL § 715. NYSCEF 3212 (Verdict Sheet); Ex. 88.[6] Thus, the NYAG's request for non-monetary relief "rescinding" these three transactions is moot, as each transaction was terminated years ago. *See Weeks Woodlands Ass'n, Inc. v. Dormitory Auth. of State,* 95 A.D.3d 747, 753 (1st Dep't 2012) ("mootness is an issue that can be raised at anytime" including due to "changed circumstances"), *aff'd,* 20 N.Y.3d 919 (2012).[7]

6. <u>The NRA Implemented a New Whistleblower Policy, Administered by Mensinger.</u>

In January 2020, the NRA promulgated a whistleblower policy that fully complied with New York law. Then, in January 2024, the NRA went further and promulgated a new whistleblower policy administered and overseen by Mensinger that also fully complies with New York law and includes an anonymous reporting hotline. Ex. 39; Ex. 40 [Kurtz May 24, 2024 Report

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[6] The fact that the NRA's former Interim Executive Vice President, Andrew Arulanandam, terminated the last of these contracts (with Board member Marion Hammer) in April 2024, within two months of becoming interim EVP, *see* Ex. 37, only underscores that the NRA's "tone at the top" and control environment is dramatically different than in 2018. The NYAG points to an email from NRA Advancement employee Colleen Sterner expressing consternation with the NRA's stringent procurement policy, but the email chain reveals unequivocally that compliance with the policy was enforced by Mensinger and Rowling—illustrating again the NRA's dramatically different control environment currently. *See* Ex. 38.

[7] Further, LaPierre repaid the NRA for any hair and makeup expenses incurred by his wife and others, *see* Trial Tr. 4293 (LaPierre), and the jury found no damage resulting from the Phillips contract (which ended nearly five years ago), NYSCEF 3212 (Verdict Sheet) at 9, making any "recission" doubly inappropriate.

at pp. 26–30]. The NRA emailed the policy to all employees, and posts NRA Integrity Hotline posters in conspicuous locations. Ex. 39; Ex. 41. Under the NRA's whistleblower policy, all allegations of misconduct are reported to Mensinger for review and investigation, and the NRA will discipline anyone who retaliates against a complainant. Ex. 30 [Mensinger May 17 Depo. 14:11-21, 285:11–287:9]; Ex. 31.

Mensinger, a highly credentialed compliance professional with decades of experience, follows up with and investigates hotline complaints and reports to the Audit Committee regarding his findings. Ex. 31. Further, upon being elected EVP, Hamlin made the decision to split the Secretary and General Counsel roles and appoint a new General Counsel to replace Frazer. Ex. 1 [Hamlin Depo. 75:19-77:13].[8]

In addition, two individuals found by the jury to be whistleblowers (Marshall and Journey) have rejoined the NRA Board. Ex. 43. Marshall testified that the NRA's new whistleblower policy is a good one and that the NRA has been much more responsive to his requests for information than in the past. Ex. 19 [Marshall Depo. 79:11-80:3, 81:4-18]. Two of the Top Concerns whistleblowers (Rowling and Erstling) have been promoted to senior positions since making their whistleblower report in July 2018, indicating a highly favorable environment at the NRA for whistleblowers. Ex. 45; Ex. 46.

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[8] The fact that Frazer's duties in overseeing whistleblower complaints have been transferred to Mensinger moots any claim that the NYAG may have to remove Frazer from such duties. Further, to the extent the NYAG seeks to remove unspecified Board members for their dealings with whistleblowers, the NYAG failed to invoke the mechanism to remove officers set forth in the N-PCL § 706(d), which allows the NYAG to bring an action to "remov[e] a director for cause." In addition, Carolyn Meadows, who as President in 2019 made the decision not to assign committees to Knight, Schneider, and Maloney, is no longer President, no longer on the Audit Committee, and has no continuing officer role. *See* Ex. 42. [Barr Depo. 279:16-18]. Marion Hammer, identified as a retaliator by the NYAG, is removed from the Ethics Committee and has not had an officer position at the NRA in many decades. *See* Ex. 44.

7. The NRA Adopted Processes to Ensure the Accuracy of Its Form 990 Filings.

The "false filings" alleged by the NYAG pertained to statements on the Form 990 regarding the NRA's compliance, including alleged false statements about the NRA's compliance with its policies around conflicts of interest, first-class and charter travel, expense reimbursements, and excess benefits. Ex. 40 [Kurtz May 24 Report pp. 30–32]; NYSCEF 3270 at pp. 13-17 (NYAG presenting these alleged misstatements as the factual predicate for the jury's "false filing" verdict). The NRA's implementation of robust controls in those areas—discussed above—also remedy the alleged falsity in the NRA's Form 990 filings.

In addition, the NRA implemented new processes and layers of oversight to ensure the accuracy of its Form 990 and CHAR500 filings going forward. Its Form 990s are reviewed by Stacey Cullen of Aprio, an experienced tax professional and attorney with an LLM in taxation. Cullen reviews the 990 with Rowling, and then makes a presentation on the 990 to the NRA Audit Committee. *See* Ex. 82 [Trial Tr. 3630-3674 (Cullen)]. The Audit Committee, along with Rowling and Cullen, is highly involved in ensuring the accuracy of the Form 990 filings. *Id*. The NRA has also begun using C-Track software to ensure that all the financial figures are correct and that every part of the 990 is filled out in a complete and consistent manner. *Id*. 3636-37 (Cullen).

8. The NRA Has Multiple Layers of Controls Testing.

The NRA's policies, procedures and other controls are subject to multiple layers of regular testing to ensure their effectiveness. As described in the Risk Assessment, Rowling and NRA Financial Services employee David Warren tested the NRA's major contracts, purchase orders and payments for compliance with NRA controls. *See* Ex. 11. The NRA hired a new Internal Auditor, David Medrano, who is currently conducting testing in areas related to this litigation (including re-testing the work of Rowling and Warren). Ex. 47; Ex. 48. Once this testing is completed, Medrano will develop a yearly audit plan that includes a schedule for internal testing. Ex. 49

[Medrano Depo. 40:9-24].

In addition, since 2019, the NRA's external auditor, Aprio, conducted extensive testing of the NRA's internal controls related to the allegations in this lawsuit as part of the special procedures it undertook in accepting and renewing the NRA engagement. Ex. 50; Ex. 51; Ex. 52; Ex. 81 [Trial Tr. 3597-99, 3608-10 (Lerner)]. In September 2023, Aprio issued a letter finding that "NRA's management continues to take steps to enhance internal controls, oversight of long-term- contracts, and ... the NRA was transparent, understands the issues and has had and still are making positive efforts to tighten controls." Ex. 51. In April 2024, Aprio reported to the Audit Committee that "[a]ll matters addressed in the prior year letter have been resolved and processes have been implemented to mitigate risk." Ex. 52. In sum, the NRA's internal controls undergo robust testing to ensure they are operating effectively. Ex. 32 [Plotts Depo. 61:6–18]; Ex. 83 [Trial Tr. 3673-86, 3691-94 (Plotts)]. And these controls have developed and matured as compared to previous years due to testing and feedback from Aprio. Ex. 55; Ex. 56; Ex. 57; Ex. 52.

9. **The NRA Conducts Regular Compliance Trainings and Cemented a Culture of Compliance.**

Since 2018, the NRA has held mandatory compliance training for all employees that focuses especially on the compliance failures at issue in this lawsuit. Ex. 58; Ex. 60; Ex. 62. Mensinger has expanded and revamped this training and has extended it to Board members and NRA field offices, as well as online compliance training. Ex. 64; Ex. 65; Ex. 19. Mensinger hosted a highly successful "Integrity Week" at the NRA and has conducted a core value survey of employees. Ex. 66; Ex. 67. In sum, Mensinger has instilled an organization-wide culture of compliance at the NRA. Ex. 10 [Bachenberg Depo. 148:23-150:8].

C. Balancing the Equities Disfavors the NYAG's Costly, Duplicative Relief.

Where, as here, a statute provides for discretionary equitable remedies to ensure

compliance, "a balancing of the equities" is required in determining whether—or to what extent—the relief statutorily permitted should be imposed. *Fine*, 72 N.Y.2d at 969; *Medvin*, 46 A.D.2d at 912. DOJ guidelines, though not applicable here, also provide that a cost-benefit analysis is a central consideration as to whether a monitor should be requested in settlement negotiations. *See* Polite Memo at 2.

The purported benefits of the NYAG's proposed relief (*e.g.*, independent monitoring) would merely duplicate measures already in place at the NRA (*e.g.*, a Chief Compliance Officer, internal audit, and Aprio's special procedures testing). These redundant "benefits" would be levied at grave cost to the NRA's finances, operations, and reputation—at a precarious moment for the Association. Ex. 15 [Schropp Depo. 25:12-27:12]; Ex. 16 [Commerford Depo. 116:16-118:8]; Ex. 17 [Rowling Depo. 92:4-93:10]; Ex. 68 [Nichols May 24 Report pp. 3-5]. The imposition of a monitor would have a marked negative impact on donations and membership. Ex. 16 [Commerford Depo 116:16–118:8]; Ex. 15 [Schropp Depo. 25:12–27:12]. Simply put, donors are not interested in contributing to fund a compliance monitor at the expense of the NRA's core mission related-programs. *Id.* 34:5–40-12. The NYAG's own expert admits that donor intent should matter greatly. *See* Ex. 3 [Tenenbaum Depo. 26:15–24].

Imposition of a monitor would be perceived as an indication that NRA leadership cannot be trusted and would send a negative signal to potential donors and members. Ex. 1 [Hamlin Depo. 141:14-142:11] ("If we get a monitor, it's devastating. The members aren't going to come back because it shows distrust, in my opinion."); Ex. 10 [Bachenberg Depo. 131:25-132:10] ("[A]ny connotation of a monitor would be detrimental to our members and donors. I believe it reinforces that we . . . can't be trusted and our policies and procedures in place are not sufficient."). Indeed, imposition of a monitor would be perceived as the NRA losing its independence and control of its

mission. Ex. 16 [Commerford Depo. 12:12-13:25, 23:4-25:12, 47:19–51:11, 93:16–94:16, 112:4-23]. A monitorship would also raise questions among donors and members about the privacy of their personal information, and the government's ability to access such information. *Id.* 27:9-20, 53:19-54:11, 93:16–94-16.

In addition to the substantial, continuing loss of donors and members that a monitor would occasion, a monitorship would impose substantial direct costs on the NRA. Such costs include the fees for the monitor and any staff he or she would hire, which would be borne by the NRA, along with the diversion of NRA staff resources "to devote to the monitorship itself" instead of funding core NRA programs, developing new donors and members, or hiring additional compliance personnel. Ex. 22 [Sullivan Depo. 263:10–264:8, 286:14-287:15]. Those costs would be substantial. Ex. 23 [Sullivan & Blacker May 24 Supplemental Report pp. 40-42]. They would impair the ability of the NRA to hire more compliance employees. Ex. 17 [Rowling Depo. 135:3-136:8]. And monitorships carry with them a well-recognized risk of scope creep, where the scope of the monitorship expands over time. Ex. 69 [Suffecool Depo. 148:8-151:5].

In contrast to the crushing costs, the NYAG can point to no discernible benefit to a compliance monitor. Ex. 19 [Marshall Depo. 64:11-65:11] (compliance monitor would duplicate Mensinger's role; the NRA is currently functioning well, and "[t]o ask us to have to report to some third party I think is a burden that's not necessary."); Ex. 69 [Suffecool Depo. 178:6-179:5] (compliance monitor would not add any unique skill set that the NRA currently lacks). The NYAG's expert on monitorships was unable to point to any function a monitor would be able to perform that could not be performed by the NRA's Chief Compliance Officer. Ex. 18 [Frank Depo. 335:12–336:15]. Another NYAG expert undercut the NYAG's argument that a monitor is necessary by citing several non-profits that successfully righted themselves after government

investigations **without** third-party monitors. Ex. 3 [Tenenbaum Depo. 238:10–239:11].

Moreover, the NYAG's own experts admit that the NRA has good reasons to prefer that compliance functions be carried out by its own employees, as opposed to an "independent," court-appointed agent who would not owe fiduciary duties to the NRA. Ex. 18 [Frank Depo 184:13–185:5]. Further, the NYAG's experts fail to account for heightened scrutiny on the NRA by members and donors. Ex. 20 [Ector Depo. 88:5 89:9] (membership "made it clear to me . . . that they wanted change."). As First Vice President Bachenberg noted, the NRA's "members and donors are our best monitor." Ex. 10 [Bachenberg Depo. 150:4-8].

Tellingly, none of the NYAG's experts perform a cost-benefit analysis. The NRA's experts conducted just such an analysis and found that imposition of a monitor would exacerbate a decline in membership and donations and compromise the NRA's very existence. Ex. 23 [Sullivan & Blacker May 24 Supplemental Report pp. 40-44]; Ex. 40 [Kurtz May 24 Report p. 21].

D. The NYAG's Proposed Relief Would Impermissibly Burden the NRA's First Amendment Advocacy and Organizational Autonomy.

Each member of the NRA's 76-person, independent Board of Directors is elected directly by the NRA's millions of members as part of a balloting process. Ex. 70 ("NRA Bylaws"), Article VI, Section 1.a. The Board, in turn, elects the NRA's President, two vice presidents, Executive Vice President/CEO, Treasurer/CFO, Secretary, and Chief Compliance Officer. *See id.,* Article V, Section 1.a. For its revenues, the NRA relies on membership dues and donations from Second Amendment supporters. Ex. 16 [Commerford Depo at 82:12-15] ("membership dollars" are "the NRA's biggest source of revenues"). A core part of the NRA's mission is to advocate for Second Amendment rights, both by bringing lawsuits against the state and federal governments and by lobbying. *See* Ex. 70 [NRA Bylaws, Article II].

The free speech and association rights of the NRA and its members fall within the core of

the First Amendment's protection. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 337 (2010). These First Amendment rights are "protected not only against heavy-handed- frontal attack, but also from being stifled by more subtle governmental interference." *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 544 (1963). "If the law curtails [an advocacy group's] ability to speak on [its] behalf, it runs afoul of the First Amendment even when the law is not an outright ban." *Ted Cruz for Senate v. Fed. Election Comm'n*, 542 F. Supp. 3d 1, 10 (D.D.C. 2021), *aff'd sub nom. Fed. Election Comm'n v. Cruz*, 596 U.S. 289 (2022).

The NRA's sovereignty over its internal governance is protected by the First Amendment, and it is essential to the NRA's effectiveness. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622–23 (1984). "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it," and there is no "exception to this settled rule for charities." *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 790–91 (1988). "The [NRA]'s determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 224 (1986). And the NRA has a First Amendment right to be governed by officials who "sincerely share its views." *Slattery v. Hochul*, 61 F.4th 278, 288 (2d Cir. 2023). Therefore, the Court was correct to recognize that "state or court oversight" of the NRA raises substantial issues regarding "First Amendment protections against government infringement," and "internal remedies, private remedies" would be more appropriate than "state oversight." *See* NYSCEF 3246 (Tr. of March 6, 2024 conference) at 10-11.

The First Amendment concerns are particularly acute given that Attorney General James sought to dissolve the NRA amid a now-notorious campaign by New York State officials to financially cripple it; like those officials, James made statements suggesting she targeted the NRA

out of political animus. *See* NYSCEF 1409; *Nat'l Rifle Ass'n of Am. v. Vullo*, 144 S. Ct. 1316, 1330 (2024) (noting that the campaign by New York officials "to punish the NRA's gun-promotion advocacy . . . [i]f true, violates the First Amendment").

Against this constitutionally concerning backdrop, the NYAG proposes that a monitor be imposed upon a political advocacy group by direct court order, over the NRA's own objection. Such monitorships are extremely rare, *see Cobell v. Norton*, 334 F.3d 1128, 1140 (D.C. Cir. 2003); under these circumstances, one would be unprecedented. The NYAG's own expert on monitorships testified that he had never heard of such a court-imposed-monitorship. Ex. 18 [Frank Depo. 54:14–18]. Almost always, compliance monitors are imposed as part of a consensual settlement between the government and a private party. Thus, current DOJ guidance on when to seek a monitorship in negotiations says that it applies to "corporate resolution agreements," including deferred prosecution agreements, non-prosecution agreements, and plea agreements. *See* Polite Memo at 1, 6. The Memo refers expressly to the process for approving "monitorship agreements," and the terms of such "agreements." *Id*. at 4.

The few cases involving monitorships imposed directly on a private party by a court, over a party's objection, have proven to be "contentious" and expensive. *See United States v. Apple Inc*., 787 F.3d 131, 134-36 (2d Cir. 2015) (noting "contentious" relationship between monitor and monitored party, including accusations of inflated fees and inappropriate requests for access); *Cobell*, 334 F.3d at 1134–37 (noting "heated meetings" between the monitor and the monitored party that led to further litigation); *People of the State of New York, et al. v. Donald J. Trump, et al.*, Index No. 452564/2022 (Sup. Ct. New York County) (January 29, 2024 Letter) (defendants alleging that monitor was engaged in "'Javert' like quest" and was seizing on "immaterial inaccuracies" to justify "expensive and meaningless ongoing oversight").

Further, a monitorship imposed directly by the Court would lack the flexibility and "direct relationship" between the monitor and the NRA allowed in consensual monitorships created by agreement. Like the monitor in *Apple*, the NYAG's expert on monitorships, Jonny Frank, admitted that he did not account for "the formal and adversarial context of a monitorship imposed over the objection of the monitored party." *Apple*, 787 F.3d at 135; *see also id.* at 141 (Furman, J., concurring) (noting that the District Court was "mindful that a monitorship imposed over Apple's objection could be a bumpy affair"); Ex. 18 [Frank Depo. 293:23–294:7.]

This Court emphasized that "the focus of remedies should be "on compliance rather than punishment." NYSCEF 3246 (Tr. of March 6, 2024 conference) at 10; *see also* Polite Memo. at 2. Imposing a monitor over the NRA's objection, based on misconduct occurring years ago under different corporate leadership in a different control environment, and in the face of donor and member unwillingness to support the NRA if it is placed under a monitorship, would indeed be punitive. *See* Ex. 40 [Kurtz May 24 Report pp. 17–21.] In addition, monitorships are typically imposed in cases involving criminal violations or public harm—not cases, like this one, involving harm to the NRA. DOJ Justice Manual § 9-28.1700. The NYAG's own expert on monitorships admits that companies find monitorships undesirable and seek to avoid them. Ex. 18 [Frank Depo. 180:10–14.]

Finally, fundraising is an expressive activity that is fully protected by the First Amendment. *Riley*, 487 U.S. at 794–95 (striking down law that would cap the fees that professional fundraisers could collect to what the government deemed a "reasonable" amount); *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984); *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). Thus, the NYAG's proposal to bar the NRA from soliciting or collecting funds in New York is patently overbroad and would violate the First Amendment. Ex.

40 [Kurtz May 24 Report p. 34-35].

III. CONCLUSION

The Court should deny the relief sought by the NYAG in its entirety.

Dated: July 1, 2024
New York, New York

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH WORD COUNT REQUIREMENT

I certify that the foregoing memorandum of law filed on behalf of the National Rifle Association of America complies with the applicable word count limit. Specifically, the memorandum of law contains fewer than 7,000 words.

In preparing this certification, I relied on the word count function of the word processing- system used to prepare this memorandum of law.

/s/ Noah Peters
Noah Peters

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion and related documents was electronically served via the Court's electronic case filing system upon all counsel of record on July 1, 2024.

/s/ Noah Peters
Noah Peters