

DALLAS | NEW YORK

**B R E W E R**  
ATTORNEYS & COUNSELORS

June 20, 2024

**VIA ECF**

The Hon. Anne M. Nardacci  
United States District Judge  
United States District Court  
James T. Foley U.S. Courthouse  
445 Broadway, First Floor  
Albany, NY 13901

Re: ***National Rifle Association of America v. Cuomo, No. 1:18-CV-0566-TJM-CFH***  
**(the NRA's Letter in Further Support of its Request to Lift the Discovery Stay)**

Dear Judge Nardacci:

The National Rifle Association of America (“NRA”) writes to address points raised in defendant Andrew Cuomo’s letter (Doc. 403) opposing lifting the stay.

Neither this Court nor the Second Circuit ever held that Cuomo enjoys qualified immunity. Thus, this purported holding is not the “law of the case.” *Compare* Doc. 403 at 1, 3-4. Indeed, Judge McAvoy **rejected** Vullo’s claim for qualified immunity. Doc. 322. Although that decision was reversed by the Second Circuit, the Supreme Court vacated the Second Circuit’s opinion **in its entirety**. *Vullo*, 144 S. Ct. at 1332 (“The judgment of the U.S. Court of Appeals for the Second Circuit is vacated, and the case remanded for further proceedings consistent with this opinion”). Thus, Cuomo’s reliance on the Second Circuit’s now-vacated qualified immunity holding as “law of the case” (Doc. 403 at p. 1) is without merit.

Indeed, Cuomo did not raise qualified immunity in the almost **five years** preceding his motion for judgment on the pleadings, filed on March 20, 2023. Doc. 381. That was for good reason—as the Supreme Court noted, Cuomo’s public statements make clear that he meant to abuse his government power to “forc[e] the NRA into financial jeopardy” and “shut them down” due to his desire to “put the gun lobby out of business.” Docs. 387-2, 387-4; *see also Nat’l Rifle Ass’n of Am. v. Vullo*, 144 S. Ct. 1316, 1331 n. 6 (2024). As was clearly established—many decades before this litigation—using government power to “forc[e]” an advocacy group “into financial jeopardy” based on its speech brazenly violates the First Amendment. *See Vullo*, 144 S. Ct. 1316 at 1322 (in holding the NRA stated a First Amendment claim against Vullo, Supreme Court “reaffirm[ed] what it said” in a case decided “[s]ix decades ago,” *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963)); *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134-136 (1992) (holding that a small security fee, capped at \$1,000, was unconstitutional where the precise amount “depend[ed] on [an] administrator’s measure of the amount of hostility likely to be created by the speech”). Contrary to Cuomo’s suggestion (Doc. 403 at p. 3), there is nothing about the “particular circumstances” Cuomo confronted that would change the clearly-established

# B R E W E R

**Hon. Anne M. Nardacci**

June 20, 2024

Page 2

law governing his conduct. *See Nat’l Ass’n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 461 (1958) (“unconstitutional intimidation of the free exercise of the right to advocate” violates the First Amendment). Cuomo’s motion for judgment on the pleadings—based almost entirely on the Second Circuit’s now-vacated *Vullo* decision—falls well short of the “strong showing” necessary to continue delaying discovery pending resolution of his motion for judgment on the pleadings. *See Kaplan v. Lebanese Canadian Bank, SAL*, 610 F. Supp. 3d 533, 534 (S.D.N.Y. 2022) (requiring “a strong showing that the plaintiff’s claim is unmeritorious” to justify a stay pending a dismissal motion) (cleaned up).

In addition, continuing to stay discovery indefinitely would cause the NRA irreparable harm. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 374 (1976). That is so even where money damages may ultimately be recovered. *Erie Boulevard Triangle Corp. v. City of Schenectady*, 152 F. Supp. 2d 241, 248 (N.D.N.Y. 2001). Further, the NRA faces substantial prejudice because continuing the stay would “threaten delaying any compensation to which [the NRA] might be entitled by at least several months, if not a year or more.” *Carroll v. Trump*, 687 F. Supp. 3d 394, 403 (S.D.N.Y. 2023) (denying further stay despite former President Trump’s immunity argument). Indeed, in the Tweets cited above, then-Governor Cuomo proudly linked to a news article noting allegations that his blacklisting campaign caused the NRA “tens of millions of dollars in damages.” Doc. 386-3. That number has grown in the six years since the article was written. In addition, “[a]s more time passes, the higher the risk that witnesses will become unavailable and memories will fade.” *Kaplan*, 610 F. Supp. 3d at 535.

Finally, Cuomo points to his former government service in support of a finding that the public interest supports a stay. Doc. 403 at p. 7. But in this age of rampant censorship and abuse of government power, the “real risk” is that government officials will seek to shut down speech they dislike with impunity—not that they may have to participate in discovery six years after being sued for a blatant effort to “shut...down” a political opponent. There is a strong public interest in holding public figures accountable for such behavior. *Carroll*, 687 F.Supp. 3d at 403; *see also Vullo*, 144 S. Ct. at 1332 (noting “constitutional concerns with the kind of intermediary strategy that Vullo [and Cuomo] purportedly adopted to target the NRA’s advocacy,” which would “allow[] government officials to expand their regulatory jurisdiction to suppress the speech of organizations that they have no direct control over,” like the NRA) (cleaned up).

The Court should lift the discovery stay as to Cuomo.

Dated: June 20, 2024

Respectfully submitted,

/s/ William A. Brewer

# B R E W E R

**Hon. Anne M. Nardacci**

June 20, 2024

Page 3

William A. Brewer III (Bar No. 700217)

wab@brewerattorneys.com

Sarah B. Rogers (Bar No. 700207)

sbr@brewerattorneys.com

Noah Peters (Bar No. 703969)

nbp@brewerattorneys.com

**BREWER, ATTORNEYS &  
COUNSELORS**

750 Lexington Avenue, 14th Floor

New York, New York 10022

Telephone: (212) 489-1400

Facsimile: (212) 751-2849

**ATTORNEYS FOR THE NATIONAL  
RIFLE ASSOCIATION OF AMERICA**