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

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK, Plaintiff, v. THE NATIONAL RIFLE ASSOCIATION OF AMERICA, WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL Defendants.	Index No. 451625/2020 Hon. Joel M. Cohen

PLAINTIFF'S RESPONSE IN FURTHER SUPPORT OF PROPOSED FINAL JUDGMENT AND IN OPPOSITION TO DEFENDANT NRA'S PROPOSED JUDGMENT

LETITIA JAMES
Attorney General of the
State of New York
28 Liberty Street
New York, NY 10005

Monica Connell
Stephen Thompson
Alexander Mendelson
Assistant Attorneys General

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

State Statutes

Federal Statutes

On behalf of Plaintiff, the People of the State of New York, the Office of Attorney General Letitia James ("OAG") respectfully submits this memorandum of law in further support of Plaintiff's proposed final judgment in the above-captioned matter (the "Proposed Judgment") and in opposition to the NRA's post-trial submission and proposals (NYSCEF 3594, hereinafter "NRA MOL").

PRELIMINARY STATEMENT

Following a jury determination of liability against the NRA, the Court directed certain "specific and targeted" reforms for the NRA to implement to provide "reasonable assurance, in the absence of a monitor, against lapses once the bright lights of litigation have dimmed." NYSCEF 3431 at 2255:14-18; *see also id.* at 2256:4-2258:12. The NRA's proposals fall far short of the Court's directives. Instead, the NRA continues to perpetuate the denial of accountability by entrenched, old-guard leadership, repeated denials of wrongdoing, and lies to its members and employees about the jury verdict. While the NRA's proposed judgment incorporates some changes suggested by Plaintiff and Plaintiff's experts, its proposals reveal that its overarching concerns are to protect entrenched board leadership. Indeed, some of the reform-minded NRA leadership the Court credited in its oral decision have subsequently written the Court to voice alarm at the NRA's current state of affairs or, in the case of Rocky Marshall, filed a whistleblower complaint last week alleging retaliation by senior NRA board members. Reply Affirmation of Stephen C. Thompson dated October 16, 2024 ("Thompson Reply Aff.") at ¶ 4.

In contrast to the NRA, Plaintiff's proposals are workable, pragmatic, and hew closely to the Court's directives for reform within the NRA. The pervasive illegal conduct that Plaintiff established at trial, the NRA's refusal to meaningfully accept any accountability, and its ongoing dysfunctional governance require imposing the remedies Plaintiff proposes. Anything less will put

the NRA at risk of continuing down the same path of violating New York charities laws, harming the interests of its members, and undermining the public's trust in charities to keep their promises.

ARGUMENT

I. The NRA's Proposed Measures Are Insufficient to Reduce Board Entrenchment

In its Order, the Court identified entrenchment as a problem within the NRA and specifically identified the dominance of entrenched leadership in the nomination process and on key committees as a concern. NYSCEF 3431 at 2256:8-2258:12. The Court suggested common-sense changes, which Plaintiff's proposed judgment adopts. The NRA, on the other hand, has explicitly or implicitly rejected key changes to address entrenchment.

A. The NRA's Proposals for Presidential Nominations of Audit Committee Members Will Not Prevent Entrenchment

In its proposed judgment, the NRA suggests that the NRA President, currently Bob Barr, remain the gatekeeper of nominations for the Audit Committee, and that any nominations from the floor be restricted to a contingency if Presidential nominations fail. *See* NYSCEF 3585 at 15. As noted in Plaintiff's opening brief, Plaintiff does not object wholesale to the President's nomination of committee members, but those nominations must be given no more weight than, and must be concurrent with, any other nominations by the Board.

The NRA's contention that the NRA President must retain the authority to make initial recommendations to the NRA Board to "ensure orderly, vetted nominations," NRA MOL at 10, ignores a long and established history of the NRA President abusing control over the nomination process to reward loyalty and to quell dissent. It also wrongly assumes that the NRA President—and the President alone—is uniquely qualified to determine whether individuals are adequately versed in basic finance and accounting practices to serve on the Audit Committee. This is a subjective determination ripe for abuse, which is a risk the Court's directives are intended to guard against.

That risk is not merely hypothetical. The actions of the NRA's current leadership underscore the problem with the NRA's proposal. President Barr has been on the NRA Board for over 25 years. NYSCEF 3431 at 400:22-24. After he was elected, President Barr announced that Charles Cotton, another long-term board member who was on the Board during much of the unlawful conduct, would continue as Chair of the Audit Committee; Chair of the Ethics Committee; Vice-Chair of Bylaws and Resolutions; and on the Legal Affairs and Finance Committees. NYSCEF 3474. Barr has only changed the make-up of the key committees under the pressure of this litigation and even then, only by increments that ensure control by the entrenched leadership. President Barr is a far cry from the "sharp break" with the past envisioned by the Court and is a real-time reminder of why the NRA's proposal—to keep the NRA President as gatekeeper in selecting initial nominations for Audit Committee members—only heightens the risk of entrenchment in a critical oversight function of the NRA. The simple solution is for the full Board to identify potential candidates for membership on the Audit Committee (and other key committees), permit them to set out their qualifications on the Board portal or through some other means, and allow the NRA Board to vote for the same, as required by N-PCL § 712(a).

B. The NRA's Proposed Director Nomination Policy Will Not Expand Candidacy, Limit Hegemony, or Reduce Entrenchment

The Court outlined a straightforward, simple change to the NRA's broken nominating process: "expand[], for at least three years, the path to the candidacy for board elections; specifically, limiting the hegemony of the Nominating Committee for enough board cycles to cover all 76 board members." NYSCEF 3431 at 2256:11-14. The Court suggested that "for the next three elections at least, any proposed candidate who meets certain minimum qualifications would be on the ballot, full stop[.]" *Id.* at 2256:22-2257:1. The NRA did not follow that suggestion for the upcoming election cycle, and does not follow that suggestion in its proposal for future elections.

Instead, the NRA's proposed director nomination policy disregards the Court's direction and, remarkably, gives the Nominating Committee the same unlimited discretion and authority it has always had. The NRA's proposed "requirement" that the Nominating Committee "endeavor to nominate fresh candidates" is window dressing. *See* NRA MOL at 13. A requirement to try is not a requirement. And requiring the Nominating Committee to "confer with elected officers on desired attributes for Board candidates" is hardly a recipe for change. *Id.* The NRA's proposals are toothless measures that do nothing to change the status quo or curb the Nominating Committee's stranglehold over the Board nomination process.

In championing the status quo over the reforms sought by the Court, the NRA claims that opening up the nomination process "could result in millions of candidacies." *Id.* at 12-13. The NRA has no basis for arguing that a meaningful percentage (let alone a majority) of eligible members would run for a seat if ballot access were broadened. Likewise, the NRA asserts that a more inclusive ballot would pose "significant problems for the orderly administration of NRA elections" on both the "front end" and "back end" of the election process without identifying what those problems might be, beyond unsupported additional costs to publish candidates' biographical sketches in the Association's magazine. NYSCEF 3596 at Ex. E ¶ 7-8. But even accepting the NRA's unsupported doomsday scenario, this risk is squarely addressed by Plaintiff's proposal of taking a randomized sample of eligible candidates. The NRA also raises concerns about the potential for gamesmanship with a first-come, first-serve approach—an approach neither the Court nor Plaintiff ever advocated for, and that is also addressed by Plaintiff's randomization proposal. That red herring should be disregarded.

The NRA's Board continues to be plagued by entrenched leadership. Plaintiff has offered a workable proposal that hews closely to the Court's directive to remove barriers to new Board candidates for at least three election cycles by temporarily stripping the Nominating Committee of its gatekeeping role. In contrast, the NRA proposes that the Nominating Committee continue to pick the

slate of Board candidates, and that the NRA President and other elected officers continue to pick the Nominating Committee. In other words, it proposes that things stay the same.

C. Recent Changes to Committee Composition Made By President Barr Do Not Signal the Sharp Break with the Past that the NRA Purports and Provide No Reasonable Assurance Moving Forward

The entrenched leadership of the NRA's Board is further perpetuated and empowered by their membership on its key committees. Notwithstanding token changes made by President Barr in the aftermath of the bench phase of the trial, these committees generally remain composed by, and under the control of, long-tenured directors. Further, President Barr's one-off changes made under the spotlight of this litigation and the Damoclean sword of the Court's anticipated judgment are insufficient to assure the "sharp break with the past" sought by the Court moving forward. Instead, as the Court noted, "[c]urrent NRA leadership continues to place decisive authority in the hands of those who did not take a strong hand against improper behavior and chose instead to close ranks behind a leader, despite ample evidence of extraordinary misconduct." NYSCEF 3431 at 2255:24-2256:3.[1]

Audit: The new chair of the Audit Committee, Curtis Jenkins, has continuously served on the Audit Committee since 2017, including the relevant period of misconduct considered by the jury, and contributed to that committee's failure to exercise appropriate oversight; two new committee members—Eb Wilkinson and Charlie Beers—have expressed support for the old guard in the past. *See* NYSCEF 3505 (Wilkinson and Beers recommended Cotton be named EVP);

[1] In addition to the examples below, the continuation of the Special Litigation Committee further represents the perpetuation of entrenched leadership. For the reasons set forth in Plaintiff's initial brief, the NRA's determination to disregard the vote of the majority of the Board present for the September 2024 vote in an attempt to keep Barr, Cotton and Coy in charge of a key Board Committee is legally improper. *See* NYSCEF 3585 at 17-18. In addition to the arguments raised by Plaintiff, it appears that the bylaw in question may not be a bylaw approved by the NRA members as required by N-PCL § 709. *See* Thompson Reply Aff. Ex. B.

NYSCEF 3431 at 1827:25-1829:1 (Beers introduced resolution in support of Wayne LaPierre shortly before his nomination to the Board). Their appointment, along with former NRA President Ronald Schmeits, is no "sharp break with the past."

Ethics: The NRA's description of the Ethics Committee as a locus of change is misleading. For example, Blaine Wade is identified as having not served on "any of the 'key committees' identified at trial," NRA MOL at 13; but he, Jay Printz, and Barbara Rumpel were each installed by Charles Cotton on the EVP Search Committee and sought continuity with the past by recommending Cotton as EVP. NYSCEF 3431 at 55:16-60:13; NYSCEF 3596 at 42. Likewise, the NRA's assertion that "a majority of the [Ethics] committee's members are newly appointed" applies only to their tenure on the committee, not to their tenure on the Board. *See* Thompson Reply Aff. Ex. A (showing Board members who have served on the NRA Board continuously since 2008, and providing citations to exhibits showing tenure for all Board members).

Finance: Despite the addition of a few token reform-minded directors, the remainder of the Finance Committee is composed of long-tenured NRA Directors, *see id.* (9 of 11 on Board of Directors since at least 2008-09); and while Vice Chair Patricia Clark has never led the Finance Committee before, she has served on the Board for 25 years. *See id*. The continuing service by long time directors, and Clark's appointment as Vice Chair, are likewise not a "sharp break with the past."

Bylaws & Resolutions: The NRA again contends that "[a] majority of the committee's members are newly appointed," but five of the nine members have served on the Board since at least 2008 (Frampton, Bach, Craig, Friedman, and Sigler), including former NRA President John Sigler. *See id*. And the Bylaws & Resolutions Committee serves not a mere "advisory" role, but a

gatekeeping role, by deciding whether and how changes to the organization's governing bylaws, policies and procedures will be made.

Legal Affairs: This committee's leadership remains the same, with Wayne LaPierre loyalist and former NRA President Sandra Froman as Chair. *See* NRA MOL at 17; *see also* NYSCEF 3570 at 3923:20-24.

Even if these changes to committee composition were accepted as positive steps, they are insufficient to provide reasonable assurance that a "sharp break with the past" will continue the day after the Court enters its judgment. Instead, Plaintiff's proposed three-year prohibition against committee leadership by anyone who served on the NRA's key committees during the relevant period of misconduct provides the needed assurance for the NRA's future.

D. The NRA's Entrenched Leadership Should Not Act as Gatekeeper Between the Members and Board Reform

Contrary to the Court's directives, the NRA's entrenched leadership has insinuated itself as a gatekeeper between the NRA and its members on the issue of reform to the Board's size and governance. NRA MOL at 20-21; *see* NYSCEF 3431 at 2257:25-2258:4. The NRA has convened a Special Committee on Organization ("Special Committee"), appointed by President Barr and run by longtime NRA Directors, to "study the Board" and present yet-unspecified recommendations at the April 2025 Board meeting. NRA MOL at 20; *see* NYSCEF 3592 (Proposed Judgment) ¶ 9; NYSCEF 3596 at 5 (Barr Aff. ¶ 16). Like the fox guarding the henhouse, only the Special Committee can decide if structural changes to the Board are necessary, and no member referendum will be held unless the committee deems it "appropriate." NRA MOL at 21.

The NRA's decision to jettison the member referendum and grant all decision-making authority to a committee chosen by and consisting of entrenched leadership is antithetical to the Court's determination, shared by Plaintiff, that NRA members must be given the opportunity to

freely and fairly consider and vote to reduce the size of the Board. The NRA's cited reasons for appointing gatekeepers instead of putting the issue of Board size to a member vote ring hollow. For one, changes to the NRA's Board and to the governance of the organization do not require a change to the NRA's numerous and varied committees, as the NRA appears to imply in its brief. *See* NRA MOL at 19. Nor would it be "premature" to send a referendum on Board size to NRA members merely because the members may vote to "drastically alter[] the Board's structure and identity," as such changes could not be made without member input. *See id.* at 21. And despite extrinsic evidence of "commentators" discussing the nature of the NRA's advocacy, there is no record evidence that the NRA's "large Board" confers access to donors and voters, or that it can be otherwise credited as "the real source of its power." *Id*. at 19 (internal quotation marks omitted).

Moreover, Barr has shown his entrenchment bias with his appointments to the Special Committee, particularly his selection of two longtime NRA directors to serve as the committee's chair and vice chair: Ronnie Barrett, the EVP candidate selected and backed by anti-reform leadership at the May 2024 members' meeting over the reformer candidate and current EVP Doug Hamlin, *see* NYSCEF 3596 at 5 (Barr Aff. ¶ 16), NYSCEF 3431 at 61:13-64:22, 161:17-162:7; and Vice Chair Patricia Clark, another longtime Director. Thompson Reply Aff. Ex A. Barr also appointed David Keene, a former NRA President who entered into an illegal RPT and was rejected by the NRA members in his bid for reelection to the Board earlier this year. NYSCEF 3596 at 5 (Barr Aff. ¶ 16); NYSCEF 3570 at 2239:12-20, 2769:4-11, 3056:16-3057:20; NYSCEF 3168. There can be no doubt that the Special Committee is run by—and answers to—anti-reform leadership.

II. Measures Aimed at Improving Compliance and Transparency Do Not Address the Issues that Were Proven at Trial

A. The NRA's Proposed SOX Certification Does Not Sufficiently Account for Internal Controls

The NRA backs away from its pledge in the Commitments that the EVP and Treasurer will both sign a certification modeled after Sarbanes-Oxley ("SOX"). *See* NRA MOL at 8. The NRA now proposes that the EVP and Treasurer will merely certify that the Form 990 is accurate to the best of their knowledge. *Id*. But the NRA's proposed certification is not materially different from what is already required by the CHAR500 and Form 990, does not encompass the complete SOX certification codified at 15 U.S.C. § 7241, and does not provide any greater assurance about the NRA's internal controls.

Conspicuously absent from the NRA's proposal are the SOX requirements that the signing officer has reviewed the filing, 15 U.S.C. § 7241(a)(1); has established and maintained internal controls and evaluated their effectiveness, *id.* § 7241(a)(4)(A), (C); has communicated important issues around internal controls and fraud to both the NRA's auditor and Audit Committee, *id.* § 7241(5); and has "indicated . . . whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of their evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses." *Id.* § 7241(a)(6).

The NRA should be held to its commitment to the Court that it would require a SOX certification from its Treasurer and EVP with all the attendant representations, especially those concerning the NRA's internal controls.

B. Special Procedures Are Insufficient

In its current proposal, the NRA has abandoned its promise in the Commitments to continue special procedures performed by its independent financial statement auditor, Aprio, and to publish

the results of Aprio's work.[2] The NRA erroneously blames its unilateral abandonment of its own commitment on the OAG.

In the Commitments, the NRA pledges to continue Aprio's "special procedures" for three more years and to report the results to members. NYSCE 3484 at 1. As elicited at trial and briefly outlined in the OAG's prior memorandum, the special procedures are no substitute for an audit or testing of the NRA's internal controls. *See* NYSCEF 3585 at 25. Most importantly, because they were intended as client retention tests for Aprio's benefit, Aprio did not and would not give any opinion or assurance on the NRA's control environment or internal controls based upon the procedures. *See id.* (citing NYSCEF 3431 at 1338:5-1339:8). Accordingly, the OAG believed the NRA's reliance upon the special procedures to reassure members of reform was both misplaced and misleading. Nevertheless, the OAG's position has been that the NRA committed to its members to continue the special procedures and that this commitment may be better than nothing in terms of providing at least some external review of some NRA internal controls. However, the OAG also asserts that the NRA should be transparent and accurate, and to that end should disclose not just that special procedures were being performed, but also the nature of the work performed, the results, the limitations of the work, and that no opinions have been offered by Aprio on the NRA's internal controls.

As a better alternative, the OAG proposed that the NRA's hire a firm to test its internal controls. Rogers Aff. ¶ 5(b) (NYSCEF 3595).[3] Instead of spending money every year for its

[2] The financial statement audits are required by statute and are already publicly available as part of the NRA's CHAR500 filing. *See* Exec. Law § 172-b; 13 NYCRR § 91.5(c).

[3] Plaintiff does not agree that the NRA's filing completely and accurately describes the parties' negotiations. However, the NRA is correct that the OAG suggested internal control testing as a better alternative to the NRA's commitment to continue the special procedures. The OAG did not suggest that the NRA should abandon its commitment to its members on this point.

independent auditor to conduct special procedures, the NRA could instead incur a one-time cost to have an independent party test and opine upon the NRA's internal controls—testing that will offer more assurance to all parties, especially NRA members, regarding the NRA's control environment and the effectiveness of its reform efforts. This is still the OAG's position but, in any event, the NRA's promise to its members that such procedures would be performed by its financial statement auditors should be continued, at a minimum.

C. The NRA's Testifying Expert and His Firm Are Not an Appropriate Selection for a Compliance Consultant

One of the Court's directives was for a compliance consultant to help guide the NRA's chief compliance officer in developing the NRA's nascent compliance program. NYSCEF 3431 at 2257:2-4. The NRA plans to retain one of its testifying experts, Daniel Kurtz, and his wife and partner at his firm, Shveta Kakar, who also worked on this litigation, to serve as the compliance consultant. The OAG communicated disagreement with this selection as Mr. Kurtz is, by his own admission, not a compliance expert. *See, e.g.,* NYSCEF 3585 at 24-25; NYSCEF 3431 at 1848:23-24 ("I am not an auditor or a compliance expert."); 1877:17-24 (admitting that he is not an accountant or accounting expert); 1878:1-11 (admitting he is not an internal controls expert and has never performed a root cause analysis).

More fundamentally, Mr. Kurtz disagreed with, disregarded and diminished the jury's findings in this case. *See, e.g*., NYSCEF 3385 ¶¶ 92-101 (misconstruing and diminishing the jury's whistleblower findings); ¶¶105-106 (misconstruing post-hoc ratifications of years-long related party transactions with a failure to disclose conflicts of interest on regulatory filings); ¶¶ 105-114 (speculating, without having reviewed record evidence, that perhaps the jury was wrong in finding that false statements were made on the NRA's regulatory filings because, for example, the NRA

may not have known that it was paying millions for charter jets, personal expenses and luxury travel for LaPierre, his friends and family).

Mr. Kurtz testified—without reviewing the trial record or relevant underlying documents—that the cause of the NRA's illegal conduct was Mr. LaPierre and his allies, the "named defendants, except perhaps Mr. Frazer," and Mr. Kurtz denied that anyone else enabled the individual defendants' illegal conduct. NYSCEF 3431 at 1883:21-1884:14, 1885:1-25. Mr. Kurtz did nothing to evaluate whether there were any failures by NRA Board members in overseeing Mr. LaPierre and other senior executives. Instead, based upon a record he did not review, and admitting that he could not "point to things," he speculated that "controls were overridden by the senior executives and information . . . was . . . withheld from the board and the Audit Committee." *Id*. at 1885:20-1886:25. It is respectfully submitted that Mr. Kurtz's lack of experience, bias, presumptions, and willingness to reach conclusions without critically reviewing evidence should disqualify him from serving as a compliance consultant for the NRA as part of the adjudged remedies.

There is no lack of independent and experienced compliance experts who could apply appropriate professional skepticism and critical thought to the NRA's compliance efforts. The NRA should retain one who would be of far greater assistance to the NRA than Mr. Kurtz and more in line with the Court's directive.

III. Additional Measure to Address Recent Developments

This Court has recognized the importance of removing obstacles for qualified candidates for the Board. Plaintiff understands that the deadline for petition candidates to submit the signatures required to qualify for the ballot was October 8, 2024. Upon information and belief, there may be petition candidates who were affected by the recent storms in North Carolina and

Florida and who were unable to submit their candidacy packages by the deadline. Plaintiff requests that the following be included in the final judgment:

> The deadline for residents of North Carolina and Florida seeking nomination by petition in accordance with the NRA's bylaws shall be extended to November 15, 2024.

CONCLUSION

The jury found that the NRA violated numerous New York laws for a period of years. After the jury verdict, the NRA's current leadership lied about the verdict to its employees and members. And now, in its proposed remedies, the NRA largely disregards the Court's suggested reforms and offers to keep things the same. To adopt the NRA's proposals would be to ignore the jury's verdict, and the Court's prior pointed instructions. For the foregoing reasons, Plaintiff respectfully requests that the Court enter Plaintiff's Proposed Judgment, resolving the jury and bench trials in the above-captioned action.

[Remainder of page intentionally left blank]

Dated: October 16, 2024
New York, New York

LETITIA JAMES
Attorney General of the State of New York

/s/ Alexander Mendelson
Monica Connell
Stephen Thompson
Alexander Mendelson
Assistant Attorneys General

New York State
Office of the Attorney General
28 Liberty Street
New York, New York 10005
(212) 416-8965
Monica.Connell@ag.ny.gov

MEGHAN FAUX, *Chief Deputy Attorney General for Social Justice*
JAMES SHEEHAN, *Chief of the Charities Bureau*
EMILY STERN, *Chief of the Enforcement Section, Charities Bureau*

Of Counsel

Attorney Certification Pursuant to Commercial Division Rule 17

I, Alexander Mendelson, an attorney duly admitted to practice law before the courts of the State of New York, certify that the foregoing Memorandum of Law contains 4,012 words, excluding the parts exempted by Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)). In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law.

Dated: October 16, 2024
New York, New York

/s/ Alexander Mendelson
Alexander Mendelson