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

New York Supreme Court

Appellate Division—First Department

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

Plaintiff-Respondent,

Appellate Case No.: 2022-03159

– against –

THE NATIONAL RIFLE ASSOCIATION OF AMERICA,

Defendant-Appellant,

– and –

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

Defendants.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

What government official would not like to silence her critics? Throughout history, powerful rulers have sought to solidify their power by stamping out dissent.[1] Part of the genius of the U.S. and New York Constitutions is that they specifically protect the rights of speakers to pursue advocacy disfavored by the government.[2] "[T]he purpose behind the Bill of Rights, and of the First Amendment in particular [is] to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society."[3] When a government enforcement action has the purpose or effect of retaliating against a disfavored speaker for its speech, that action must be strictly reviewed.[4]

Unfortunately, the lower court and the New York Attorney General ("NYAG") would undo those protections. Accepting the ruling of the court below would mean that Alabama and Virginia could have lawfully driven the NAACP from

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[1] *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring) (observing "how relentless authoritarian regimes are in their attempts to stifle free speech").

[2] *See* U.S. CONST., amend. 1; N.Y. CONST. art. I § 8.; *Mills v. State of Ala.*, 384 U.S. 214, 218–19 (1966); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269, 273 (1964); *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944).

[3] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

[4] *See United States v. P.H.E., Inc.*, 965 F.2d 848, 853 (10th Cir. 1992) ("a prosecution motivated by a desire to discourage expression protected by the First Amendment is barred and must be enjoined or dismissed, irrespective of whether the challenged action could possibly be found to be unlawful."); *303 W. 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 694 (1979) ("conscious discrimination by public authorities taints the integrity of the legal process to the degree that no court should lend itself to adjudicate the merits of the enforcement action. This, even though the party raising the unequal protection claim may well have been guilty of violating the law"), *People v. Acme Markets, Inc.,* 37 N.Y.2d 326, 330–31 (1975); *People v. Goodman*, 31 N.Y.2d 262, 268–69 (1972).

their states in the 1950s and 1960s.[5] It would mean that state regulators today can use onerous, pretextual enforcement actions to ban books,[6] shutter establishments that host shows,[7] and retaliate against film studios who carry messages they do not approve.[8]

If adopted, the position of the lower court and NYAG would allow a powerful regulator to declare her hostility towards a non-profit advocacy group, take adverse action based on that animus, and face no consequences whatsoever, so long as it later claims it was "investigating" reports of wrongdoing on behalf of the target. The lower court and NYAG thus draw a roadmap by which officials can abuse state power to retaliate against non-profits which advocate for positions disfavored by those same government officials.

The roadmap is this: an official runs for office making promises to take adverse action against a speaker disfavored by her supporters. The official then follows through with an onerous and expensive investigation civil-enforcement action that causes the speaker to expend significant assets and resources. So long as

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[5] *See NAACP v. Button*, 371 U.S. 415, 437–38 (1963) (pretextual enforcement of professional ethics rules against the NAACP struck down); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–62 (1958) ("*Alabama*") (pretextual request for membership lists, allegedly to enforce incorporation rules, struck down).

[6] *Cf. Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, No. 4:22CV304-MW/MAF, 2022 WL 16985720, at *14–16 (N.D. Fla. Nov. 17, 2022).

[7] *Cf. HM Fla.-ORL, LLC v. Griffin*, No. 6:23-CV-950-GAP-LHP, 2023 WL 4157542, at *3 (M.D. Fla. June 23, 2023).

[8] *See* Complaint, *Walt Disney Parks and Resorts v. DeSantis*, 4:23-cv-00163, Doc. 1 (M.D. Fla. April 26, 2023).

the targeted entity is accused of having committed any infractions whatsoever—an extremely low bar—it has no redress for the blatant violation of its First Amendment rights. As one Supreme Court Justice has noted,

> History shows that governments sometimes seek to regulate our lives finely, acutely, thoroughly, and exhaustively. In our own time and place, criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something. If the state could use these laws not for their intended purposes but to silence those who voice unpopular ideas, little would be left of our First Amendment liberties, and little would separate us from the tyrannies of the past or the malignant fiefdoms of our own age.[9]

Allowing such discriminatory enforcement would be particularly dangerous because even the mere threat of adverse action by a powerful regulator could be enough to silence a non-profit. Selective enforcement of laws applicable to non-profit advocacy organizations would "become a weapon used to discipline political foe and the dissident."[10]

Like the lower court, the NYAG contends that any judicial scrutiny of a powerful regulator's own public statements "would present serious separation-of-powers problems."[11] Thus, the NYAG contends, an elected official's "political rhetoric" should be absolutely immune from judicial cognizance so long as the

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[9] *Nieves v. Bartlett*, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part).
[10] *United States v. Berrios*, 501 F.2d 1207, 1209 (2d Cir. 1974).
[11] Opp. 47.

government official can later cite some pretext for taking the adverse action—regardless of whether the pretext had anything at all to do with the official's actual motivation.[12]

Were the NYAG and lower court's reasoning accepted, the First Amendment would allow all but the most egregiously incompetent or corrupt government officials to sue, harass, and regulate their political opponents into silence. This is not, however, the law. The U.S. Supreme Court long ago rejected a similar rule that would render the First Amendment illusory. Instead, the First Amendment requires courts "to look through forms to the substance"[13] because "without a searching inquiry, those intent on punishing the exercise of constitutional rights could easily mask their behavior behind a complex web of post hoc rationalizations."[14]

"The Constitution often protects interests broader than those of the party seeking their vindication."[15] This case is not only about the National Rifle Association of America ("NRA"). It concerns the question of whether unpopular advocacy groups have First Amendment rights that are protected even in the face of pretextual, after-the-fact rationalizations. They do. Thus, reversal of the lower court's ruling is necessary.

ARGUMENT

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[12] *Id.*
[13] *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).
[14] *McManus v. Grippen*, 244 A.D.2d 632, 634 (1st Dept. 1997).
[15] *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978).

I. THE NRA'S COUNTERCLAIMS ARE NOT MOOT

The NYAG claims that the NRA's counterclaims only seek money damages, and that the NRA somehow dropped its requests to dismiss the NYAG's action in its entirety and for appropriate injunctive and declaratory relief. On that basis, it argues that the NRA's counterclaims "are unpreserved, abandoned on appeal, or moot."[16]

But the NRA always sought dismissal of all claims in this action. Under its "request for relief" in its Amended Verified Answer and Counterclaims, the NRA's very first request is a judgment "[d]ismissing this action in its entirety."[17]

In fact, at oral argument, Justice Cohen repeatedly stated that he understood the NRA to be seeking dismissal of the action in its entirety:

> Your position is all or nothing. Your position is that if they had this—if she had this prejudged or made statements or had it already figured out, it doesn't matter whether the claims have merit, they should still be dismissed. I think that your claim seeks all or nothing.[18]

In response, the NRA confirmed, "[o]ne of the remedies we seek is dismissal."[19]

Justice Cohen again stated: "it seems like what you're saying, if I agree with you, merits don't matter, I throw the case out or at least some of the claims . . . ."[20] He stated further that, if the counterclaims were not dismissed, "I basically would

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[16] Opp. 30.
[17] R-74.179.
[18] R-45.
[19] *Id*.
[20] R-53.

be saying that if you prove [the counterclaims], the [NYAG's] claims will be dismissed."[21] The NRA's counsel did not disagree.

Thus, the NYAG's argument that the NRA "fail[ed] to pursue a remedy initially requested, and request[ed] a different remedy instead" is not true.[22] Indeed, the NYAG cannot keep its story straight even within the confines of its own brief. Elsewhere, the NYAG admits that "the NRA sought not only a bar on [NYAG] pursuing dissolution but also dismissal of the enforcement proceeding and a declaration that [NYAG] had violated the NRA's constitutional rights."[23] It states again: "The [NRA's] counterclaims sought . . . dismissal of the enforcement action."[24] In any event, the contention that the NRA is seeking a different remedy on appeal than it did in the Supreme Court is not true.

So too, the NRA's request for injunctive relief was never limited to the NYAG's dissolution claims. Instead, the NRA seeks:

> a preliminary and permanent injunction, pursuant to CPLR 6301 and 6311, ordering James, the NYAG's Charities Bureau, its agents, representatives, employees and servants and all persons and entities in concert or participation with it and James (in her official capacity), to immediately cease and refrain from engaging in any further conduct or activity which has the purpose or effect of interfering with the NRA's exercise of the rights afforded to it under the First Amendment to the United States Constitution and Sections 8, 9 and 11 of the New York State Constitution[.][25]

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[21] *Id*.
[22] Opp. 31.
[23] *Id*. 30.
[24] *Id*. 24.
[25] R-74.180.

The NRA also seeks "such other injunctive or equitable relief to which the NRA is entitled."[26]

After the dissolution claim was dismissed by the lower court, the NRA maintained that its counterclaims remained live.[27] It noted that, after the dissolution claim was dismissed, the NYAG substituted a new claim for a compliance monitor, and "although the dissolution claims were dismissed, the new claim the NRA faces . . . is also unconstitutional."[28] It noted that "the Counterclaims allege a pattern of unconstitutional behavior by Attorney General James and other New York officials, and the Compliance Monitor Claim is yet another manifestation of that pattern."[29] The NRA observed that the withdrawal of the dissolution claim and substitution of the compliance monitor claim was a "minor amendment[]" that narrowed the scope of the NYAG's claims, but did not correct the harm the NRA was suffering as a result of the conduct.[30] And, it observed that "the NYAG's assertion of the Compliance Monitor Claim—after her dissolution claims were dismissed—further proves the NYAG's retaliatory and otherwise unconstitutional motive before and throughout her investigation and this litigation"—not simply with respect to the

[26] *Id*.
[27] R-568–70.
[28] R-569.
[29] *Id*.
[30] *Id*. (cleaned up).

dissolution claim.[31]

Further, the NYAG's argument assumes what is not true: that the lower court's ruling dismissing the dissolution claim somehow cures the taint of the NYAG's illicit motive in investigating the NRA and bringing this action in the first place. It does not. It is well-established that constitutionality must be judged based on the government actor's motive—not the court's motive. In determining motive, "[t]he analysis is directed to determining how the decision to [sue] was actually made in the case under consideration. The court may not permit vindictiveness to be hidden behind procedural cosmetics."[32] And "even a good faith decision to continue a constitutionally tainted prosecution does not erase the taint when, as alleged here, the prosecution continues to utilize the fruits of the tainted behavior."[33]

Moreover, any ambiguity as to the NRA's requested remedy is not a ground for finding the NRA's claims moot or unpreserved. The Appellate Division "review[s] questions of law and questions of fact on appeal from a judgment or order of a court of original instance."[34] When reviewing an order granting dismissal under CPLR 3211(a)(7), a court must "accept the facts alleged in the pleading as true and accord the opponent of the motion . . . 'the benefit of every possible favorable

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[31] R-569–70.
[32] *P.H.E., Inc.*, 965 F.2d at 858.
[33] *Id*. at 859.
[34] CPLR 5501.

inference [to] determine only whether the facts as alleged fit within any cognizable legal theory.'"[35]

Thus, in deciding this appeal, the Court must liberally construe the NRA's First Amendment counterclaims and sustain them if, read in the most favorable light, they "fit within any cognizable legal theory."[36] The obligation to liberally construe the NRA's pleadings ensures that any possible ambiguity must be resolved in favor of finding that the NRA has always sought dismissal of all claims against it, along with injunctive and declaratory relief.

Contrary to the NYAG's contention, the NRA preserved its argument based on the inapplicability of *Hartman* and *Nieves* to civil enforcement actions. It raised this precise argument during oral argument before the lower court.[37]

Even if the NRA had not pressed any of these matters below, it would not result in forfeiture. An issue not raised at the trial level may be raised for the first time on appeal if it is legal in nature and does not rely on facts outside the record.[38]

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[35] *Siegmund Strauss, Inc. v. E. 149th Realty Corp.*, 960 N.Y.S.2d 404, 406 (1st Dept. 2013) (quoting *Leon v. Martinez*, 84 N.Y.S.2d 83, 87–88 (1994)).

[36] *Id.* (quoting *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002) (internal quotation marks omitted)).

[37] R-47–52, 54–55.

[38] *See ESRT 501 Seventh Ave., LLC v. Regine, Ltd.*, 206 A.D.3d 448, 449 (1st Dept. 2022) ("Although defendant failed to argue before Supreme Court that the late fees, even after plaintiff's voluntary reduction, were usurious, we consider the issue as it is determinative and presents a purely legal argument"); *JW 70th St. LLC v. Simon*, 179 A.D.3d 408, 409 (1st Dept. 2020) ("Although defendant raised this argument for the first time in reply, we consider it because the issue is determinative and is purely legal"); *Bank of New York Mellon v. Arthur*, 125 A.D.3d 492, 492 (1st Dept. 2015) ("Contrary to plaintiff's argument, the arguments raised by defendant for the

And even beyond the rule that new legal issues may be raised on appeal, the NYAG's argument still fails because special rules apply to First Amendment claims. "When it comes to the First Amendment . . . an appellate court makes an independent examination of the record to protect against the diminution of First Amendment rights."[39] That is, "when a case involves free expression, [the appellate court] must make an independent examination of the whole record so as to assure [itself] that the judgment does not constitute a forbidden intrusion on the field of free expression."[40] Thus, this Court must review all First Amendment issues presented by the NRA in this appeal.

Similarly without merit is the NYAG's assertion that the NRA's counterclaims are somehow moot. "Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy."[41] "Where the case presents a live controversy and enduring consequences potentially flow from the order

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first time on appeal may be considered since the issues raised are determinative and present purely legal arguments without raising new facts"); *Seldon v. Allstate Ins. Co.*, 107 A.D.3d 424 (1st Dept. 2013); *Facie Libre Associates I, LLC v. SecondMarket Holdings, Inc.*, 103 A.D.3d 565 (1st Dept. 2013); *Vanship Holdings Ltd. v. Energy Infrastructure Acquisition Corp.*, 65 A.D.3d 405, 408 (1st Dept. 2009).

[39] *Homans v. City of Albuquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001).

[40] *San Antonio Cmty. Hosp. v. S. California Dist. Council of Carpenters*, 125 F.3d 1230, 1233 (9th Cir. 1997) (cleaned up) (quoting *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 282 (1974)).

[41] *Dreikausen v. Zoning Bd. of Appeals of City of Long Beach*, 98 N.Y.2d 165, 172 (2002).

appealed from, the appeal is not moot."[42] Thus, mootness does not apply where "relief remains at least theoretically available."[43]

Here, the NYAG's lawsuit against the NRA remains ongoing. The Court could grant the NRA relief by dismissing it. The NRA could also receive an injunction, a declaration that the NYAG's conduct was unlawful, and attorney's fees. Because this suit is ongoing and the NYAG continues to seek wide-ranging, punitive remedies against the NRA, this case is not moot.

II. THE LOWER COURT ERRED BY REFUSING TO APPLY THE *MT. HEALTHY* CAUSATION STANDARD

All agree that the NRA satisfied the first two elements of a First Amendment retaliation claim. First, it engages in protected, pro-Second Amendment speech—speech that the NYAG considers "poisonous" and wants to eliminate.[44] Second, the NYAG's initiation of an investigation and filing of this lawsuit were "adverse actions" that caused the NRA significant damage.[45] The only dispute regards the third factor: can the NRA show that the NYAG's animus caused it injury?

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of

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[42] *New York State Comm'n on Jud. Conduct v.* Rubenstein, 23 N.Y.3d 570, 576 (2014).
[43] *Dreikausen*, 98 N.Y.2d at 172.
[44] R-74.141.
[45] R-74.167.

intent as may be available," including the statements of the government actors themselves.[46] "Evidence of improper motive 'may include expressions by the officials regarding their state of mind, circumstances suggesting in a substantial fashion that the plaintiff has been singled out, or the highly unusual nature of the actions taken.'"[47] In First Amendment retaliation cases, federal and state courts in New York and elsewhere look to the public statements of the relevant decision makers and conduct a searching inquiry of the actual motivations of the government

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[46] *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-268 (1977).

[47] *Brink v. Muscente*, No. 11 CIV. 4306 ER, 2013 WL 5366371, at *9 (S.D.N.Y. Sept. 25, 2013) (quoting *Blue v. Koren*, 72 F.3d 1075, 1084 (2d Cir.1995)); *see also Baker v. City of Elmira*, 271 A.D.2d 906, 909 (3d Dept. 2000) ("newspaper articles which quote . . . City officials as strongly suggesting that plaintiff was bypassed solely as a result of his political activities and affiliation" raised triable issue of fact in suit for political discrimination).

actor.[48] Importantly, after-the-fact pretexts do not insulate the government official from scrutiny or review.[49]

Contrary to the argument of the NYAG and the lower court, there is no principle that excludes an official's "campaign trail" statements from review.[50] "An elected official can properly seek to maximize the political benefit from a decision even if the official makes the decision on the merits for wholly nonpolitical reasons."[51] "But when analyzing an official's actual motivation for a decision, anticipated political benefit may be relevant."[52]

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[48] *See Locurto v. Safir*, 264 F.3d 154, 167 (2d Cir. 2001) ("resolution of a First Amendment retaliation claim on a motion for summary judgment may not be possible if the plaintiff introduces sufficient evidence to create a genuine issue of material fact on the question of defendant's improper intent, which is a question of fact."); *Kelly v. New York State Exec. Dept.,* 203 A.D.2d 836, 839 (3d Dept. 1994) ("Courts have traditionally held that summary judgment is inappropriate where the issue is whether the protected conduct of the plaintiff was a substantial or motivating factor in an adverse employment decision because, without a searching inquiry, those intent on punishing the exercise of constitutional rights could easily mask their behavior behind a complex web of post hoc rationalizations"); *Nicholas v. Bratton*, 376 F. Supp. 3d 232, 277 (S.D.N.Y. 2019) ("[w]ith respect to determining whether a restriction on speech is impermissibly based on content, the government's purpose is the controlling consideration. Indeed, any other conception of the law would amount to a green light to government officers to intentionally discriminate based on content, so long as those officers could later conceive of any pretextual content-neutral reason for their having acted that way.") (cleaned up); *United Yellow Cab Drivers Ass'n, Inc. v. Safir*, No. 98 CIV 3670 WHP, 2002 WL 461595, at *6–8 (S.D.N.Y. Mar. 22, 2002) ("A district court should not assume that the reasons proffered by government officials for their decision to regulate speech justifies the abridgement of those rights. Because the excuses offered for refusing to permit the fullest scope of free speech are often disguised, a court must carefully sort through the reasons offered to see if they are genuine.") (internal quotation marks omitted).

[49] *Nat'l Council of Arab Americans, Act Now to Stop War & End Racism Coal. v. City of New York*, 478 F. Supp. 2d 480, 491 (S.D.N.Y. 2007); *McManus*, 244 A.D.2d at 634.

[50] Opp. 46–47.

[51] *Warren v. DeSantis*, No. 4:22CV302-RH-MAF, 2023 WL 345802, at *9 (N.D. Fla. Jan. 20, 2023).

[52] *Id*. The NYAG's reliance on *Zherka v. Amicone*, 634 F.3d 642 (2d Cir. 2011) (Opp. 46–47) is misplaced. In *Zherka*, the plaintiff was a newspaper publisher who sought to hold an elected

Thus, the rule of *Mt. Healthy City School District Board of Education v. Doyle* determines causation in this case: when a plaintiff makes a prima facie showing that retaliatory animus was a "substantial" or "motivating" factor behind the decision to take an adverse action, the burden shifts to the defendant to demonstrate by a preponderance of the evidence that it would have taken the same action in the absence of a retaliatory motive.[53]

Here, the NYAG admitted that, before she had any reason to suspect misconduct,[54] she pledged to wield the power of her office to destroy the NRA because she regards its advocacy as "poisonous" and "deadly propaganda," and promised to use her government power to pursue its members and supporters like terrorists or criminals.[55] The NRA has pleaded at great length, using the NYAG's own repeated statements, that the NYAG had an unconstitutional motive for bringing this suit.[56] Indeed, the NYAG has not seriously contested that the NRA has made a prima facie showing that retaliatory animus was a substantial factor in her decision to investigate and sue the NRA. Thus, the burden shifts to the NYAG to show she

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official liable for allegedly "defamatory" statements, presenting a case of "speech against speech." *Zherka,* 634 F.3d at 646. This case, by contrast, involves the NYAG's retaliatory investigation and lawsuit, and is not a case of "speech against speech."

[53] 429 U.S. 274, 287 (1977).

[54] R-74.169.

[55] R-74.141.

[56] R-74.141–49.

would have made the same decision in the absence of her animus. She has not even attempted to make such a showing.

The NYAG contends that *Mt. Healthy* only applies to employment claims.[57] Not so. Courts have applied the standard of *Mt. Healthy* in nearly every non-criminal context—to prisoner retaliation cases,[58] to terminations of contractors,[59] to terminations of permits,[60] to denials of government benefits,[61] to evictions,[62] to state constitutional amendments,[63] and to retaliatory government lawsuits.[64]

The lower court erroneously held that the NYAG enjoyed free rein to make good on her censorious promises because her investigation turned up alleged violations of non-profit laws. But the lower court went astray in relying on two cases—*Hartman* and *Nieves*—whose holdings are expressly limited to the contexts of retaliatory prosecutions and arrests, respectively. Instead, in the context of a retaliatory civil lawsuit, the ordinary causation standard of *Mt. Healthy* applies.

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[57] Opp. 49–50.
[58] *Martin v. Duffy*, 977 F.3d 294, 304 (4th Cir. 2020) (in prisoner retaliation case, "[t]he district court correctly concluded that *Mt. Healthy*'s burden-shifting framework governed *Martin*'s retaliation claim.").
[59] *Esperanza Peace & Just. Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433, 450–51 (W.D. Tex. 2001) (terminating government contract); *Legal Aid Soc'y v. City of New York*, 114 F. Supp. 2d 204, 234 (S.D.N.Y. 2000) (same).
[60] *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314–16 (9th Cir. 1989).
[61] *N. Mississippi Commc'ns, Inc. v. Jones*, 874 F.2d 1064, 1068–70 (5th Cir. 1989) (county board withholding of advertising to newspaper that published editorials critical of board).
[62] *Davis v. Vill. Park II Realty Co.*, 578 F.2d 461, 464 (2d Cir. 1978).
[63] *Hunter v. Underwood*, 471 U.S. 222, 231–32 (1985).
[64] *Greenwich Citizens Comm., Inc. v. Ctys. of Warren & Washington Indus. Dev. Agency*, 77 F.3d 26, 30–33 (2d Cir. 1996).

Hartman's "no probable cause" requirement does not apply outside the context of suits seeking money damages for retaliatory prosecution.[65] Indeed, the Supreme Court in *Hartman* was clear that its rule was limited to cases where "the claimed retaliation for protected conduct is a criminal charge."[66]

Further, *Nieves* justified its requirement to plead and prove absence of probable cause in the retaliatory arrest context based on two factors that are completely lacking in this context. *Nieves* noted "that protected speech is often a legitimate consideration when deciding whether to make an arrest."[67] But a party's advocacy is not a legitimate consideration for a government official determining whether to bring a civil regulatory or enforcement action. And a civil regulatory or enforcement action does not involve "split second judgments" in "circumstances that are tense, uncertain, and rapidly evolving."[68] Further, the Court cited its general reluctance to probe the subjective mental state of officers in the Fourth Amendment context—another factor inapplicable to the NYAG.[69]

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[65] *CarePartners, LLC v. Lashway*, 545 F.3d 867, 877 n. 7 (9th Cir. 2008); *Autotek, Inc. v. Cnty. of Sacramento*, No. 216CV01093KJMCKD, 2020 WL 4059564, at *13 (E.D. Cal. July 20, 2020) (*Hartman* does not apply to code enforcement actions, because they are not "prosecutorial" in nature; instead, ordinary *Mt. Healthy* burden-shifting applies), *aff'd sub nom. Lull v. Cnty. of Sacramento*, No. 20-16599, 2022 WL 171938 (9th Cir. Jan. 19, 2022).
[66] *Hartman v. Moore*, 547 U.S. 250, 260 (2006).
[67] *Nieves v. Bartlett*, 139 S. Ct. 1715, 1724 (2019).
[68] *Id*. at 1724, 1725 (internal quotation marks omitted).
[69] *Id*.

The reliance of the lower court and the NYAG on *Hartman* and *Nieves* fails for an additional reason: their rule is both limited to suits for money damages, not dismissal and not injunctive or declaratory relief.[70]

Further, *Hartman* made clear that its rule did not apply to "ordinary retaliation claims, where the government agent allegedly harboring the animus is also the individual allegedly taking the adverse action."[71] Specifically, it noted that absolute immunity bars suits for money damages against prosecutors. Thus, any suit for money damages arising from retaliatory prosecution would be brought against a "nonprosecuting official" who "induced the prosecutor to bring charges that would not have been initiated without his urging."[72] Therefore, in the retaliatory prosecution context, "the causal connection required . . . is not merely between the retaliatory animus of one person and that person's own injurious action, but between the retaliatory animus of one person and the action of another."[73] *Hartman* said that this "need to prove a chain of causation from animus to injury, with details specific to retaliatory-prosecution cases . . . provides the strongest justification for the no-probable-cause requirement espoused by the inspectors."[74]

[70] *Hartman*, 547 U.S. at 258–59 (limiting its holding to "damages actions for retaliatory prosecution under *Bivens* or § 1983"); *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part and dissenting in part) ("Bartlett contends that the officers' retaliation against his First Amendment protected speech entitles him to damages under 42 U.S.C. § 1983.").
[71] *Hartman*, 547 U.S. at 259; *see also Nieves*, 139 S. Ct. at 1730.
[72] *Hartman*, 547 U.S. at 262.
[73] *Id*.
[74] *Id*. at 259.

But in this case, there is no "causation gap." That is, the NRA is not seeking to prove that a biased investigator motivated the NYAG to bring her suit against the NRA. Instead, the NYAG is the only relevant decisionmaker, and she has repeatedly admitted her own desire to punish the NRA for its advocacy. Thus, the NYAG's argument that there is a "causation gap" in this case is without merit.[75]

For similar reasons, the NYAG's reliance on *DeMartini v. Town of Gulf Stream*[76] is misplaced. In *DeMartini*, the court found a "causation landscape . . . akin to that in *Hartman*" because "two separate outside attorneys" had advised the Town of Gulf Stream that it had a viable RICO claim against the plaintiff.[77] "Counsel's pivotal role in advising the Town that it had a good faith basis to sue supports a requirement that [the plaintiff] show the absence of probable cause for the Town's underlying lawsuit in order to establish that the Town's alleged animus caused [the plaintiff]'s injury."[78] Thus, "[l]ike the prosecutor in *Hartman* who filed the criminal action, the individuals recommending and filing the civil lawsuit here (counsel) were not the same individuals who allegedly harbored the retaliatory animus (the Town's Commissioners)."[79] But here, the NYAG harbored open animus and then investigated and filed this suit herself. The fact that the NYAG employed staff

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[75] Opp. 48.
[76] 942 F.3d 1277 (11th Cir. 2019).
[77] *Id*. at 1304.
[78] *Id*.
[79] *Id*.

attorneys does not break any causal chain. The NYAG has never contended that her subordinate line attorneys have independent decision making powers, nor could she.

Further, in *DeMartini*, the Town "had a legitimate interest in considering the plaintiff's speech in the first place."[80] That is, "the protected speech that the Town allegedly retaliated against [in *DeMartini*]—the nearly 2,000 abusive public records requests and 36 lawsuits—was the same conduct (or protected speech) for which the Town had its own legitimate, objective reasons and motivation for challenging by filing its civil RICO lawsuit."[81] By contrast, the NYAG had no legitimate interest in considering the NRA's gun rights advocacy in determining whether to investigate and sue it.

Beyond the fact that they arose in the distinctive criminal context, *Hartman* and *Nieves* do not apply for a related reason: the NRA presents direct admissions from the NYAG that she sought to weaponize her non-profit supervisory powers to punish the NRA for its "deadly propaganda."[82] As Justice Gorsuch noted in his *Nieves* concurrence, "while probable cause may wind up defeating causation in some retaliatory arrest cases, nothing in our precedent (let alone logic) suggests that causation is always unprovable just because the officer had probable cause to

[80] *Id*. at 1305.
[81] *Id*.
[82] R-74.141.

arrest."[83] Specifically, he noted that even in the retaliatory arrest context, the Court's precedent holds that "'direct admissions by prosecutors of discriminatory purpose' might be enough to allow a claim to proceed,"[84] and the Court in *Nieves* did not overrule that precedent.[85]

In addition, the NRA couples its direct evidence with evidence that the NYAG did not seek to dissolve non-profits accused of similar misconduct.[86] Thus, even if this were a retaliatory arrest case, the NRA would still survive a motion to dismiss. That is because it presents the "objective evidence" required by *Nieves* that the NYAG sued the NRA for dissolution "when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been" subject to a dissolution lawsuit.[87]

And the NRA pleads that the NYAG's dissolution action was part of an official policy of New York to crush the NRA for its advocacy. Official policies include "the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law."[88] "Plaintiffs may allege an official policy by showing the government has

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[83] *Nieves*, 139 S. Ct. at 1733 (Gorsuch, J., concurring in part and dissenting in part).
[84] *Id*. (quoting *United States v. Armstrong,* 517 U.S. 456, 469 n. 3 (1996)).
[85] *Id*.
[86] R-74.152–58.
[87] *Nieves*, 139 S. Ct. at 1727.
[88] *Connick v. Thompson*, 563 U.S. 51, 61 (2011).

failed to respond to a risk that constitutional rights will be violated in such a manner as to show 'deliberate indifference' to the risk."[89]

Here, the NRA pleads "the existence and enforcement of an official policy motivated by retaliation" that is "long-term and pervasive," thus obviating the need, even in the retaliatory arrest context, to plead the absence of probable cause.[90] As in *Lozman*, "the official policy is retaliation for prior, protected speech bearing little relation to" the NYAG's stated reasons for her suit.[91] Beginning in 2017, high-ranking New York officials devised and pursued a concerted campaign to punish the NRA for its Second Amendment advocacy.[92] This plan called for the NYAG to conduct an "investigation" of the NRA to "find" reasons to commence legal actions against the NRA.[93] The NRA became aware of this scheme when the then-New York Attorney General Eric Schneiderman became so troubled by it that he telephoned the NRA with an advance warning.[94]

Then-Governor Andrew Cuomo played a key initial role in formulating the scheme. Along with the then-Superintendent of New York's powerful Department of Financial Services, he launched a campaign to threaten institutions she regulated

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[89] *Frederick Douglass Found., Inc. v. District of Columbia*, __ F.4th __, 2023 WL 5209556, at *14 (D.C. Cir. Aug. 15, 2023).
[90] *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1954 (2018); *see also Nieves*, 139 S. Ct. at 1722.
[91] *Id.*
[92] R-74.141–47.
[93] R-74.142.
[94] *Id.*

with costly investigations, increased regulatory scrutiny, and penalties unless they discontinued their business relationships with NRA.[95] Cuomo openly bragged of his role in the scheme to destroy the NRA for its advocacy: "The regulations NY put in place are working. We're forcing the NRA into financial jeopardy. We won't stop until we shut them down."[96]

The NYAG joined the conspiracy in 2018. She vowed to follow Cuomo's financial-blacklisting campaign by "put[ting] pressure upon the banks that finance the NRA" to choke off support for its Second Amendment speech.[97] She promised that, if elected, her "top issue" would be "going after the NRA because it is a criminal enterprise."[98] The NRA pleads that the NYAG's investigation into the NRA and this suit were all fruits of the same official New York policy to crush the NRA for its gun rights advocacy. That is, this suit "presents an unusual, perhaps unique confluence of factors: substantial evidence of an extensive government campaign, of which this [action] is only a part, designed to use the burden of repeated [regulatory actions] to chill the exercise of First Amendment rights."[99] The lower court erred in failing to consider the Answer's allegations that the NRA was the

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[95] R-74.141.
[96] Andrew Cuomo (@andrewcuomo), Twitter (Aug. 3, 2018, 2:57 PM), https://twitter.com/andrewcuomo/status/1025455632755908608.
[97] R-74.146.
[98] *Id*.
[99] *P.H.E., Inc*., 965 F.2d at 855.

victim of an official policy of retaliation—allegations that, even in the criminal context, would survive dismissal.

The NYAG attempts to analogize First Amendment retaliation claims to two torts having nothing to do with the First Amendment: malicious prosecution and wrongful initiation of civil proceedings.[100] But the First Amendment imposes higher burdens on government officials than run-of-the-mill tort claims. And there is no reason in law or logic to treat the retaliatory initiation of an investigation or civil suit as different from any other adverse government action.[101]

The NYAG contends that the suit should not be dismissed in its entirety. But that is precisely the remedy that precedent demands. "[A] prosecution motivated by a desire to discourage expression protected by the First Amendment is barred and must be enjoined or dismissed, irrespective of whether the challenged action could possibly be found to be unlawful."[102] Further, "conscious discrimination by public authorities taints the integrity of the legal process to the degree that no court should lend itself to adjudicate the merits of the enforcement action. This, even though the party raising the unequal protection claim may well have been guilty of violating the

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[100] Opp. 44-45.
[101] *Nieves v. Bartlett*, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part).
[102] *P.H.E., Inc.*, 965 F.2d at 853.

law."[103] And a subsequent judicial ruling cannot cleanse the NYAG's lawsuit of her unlawful, unconstitutional motive in bringing the action in the first place.[104]

The NYAG protests that, if the NRA is allowed to proceed with its First Amendment counterclaims, her authority to enforce the New York not-for-profit laws would be undermined.[105] But the NYAG's interests in overseeing the NRA's internal management are trumped by the First Amendment. Government officials commonly cite regulatory interests that, they argue, would be better served if there was no First Amendment. But those arguments must fail. "[P]olitical speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse."[106]

For example, in *NAACP v. Button*, Virginia sought to enforce its laws forbidding the improper solicitation of legal business against the NAACP.[107] The U.S. Supreme Court held, however, that Virginia's attempt to ensure "high professional standards" and forbid alleged unethical and tortious conduct was overridden by the First Amendment: "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."[108] Similarly, in *Alabama*, the

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[103] *Klein*, 46 N.Y.2d at 694.
[104] *P.H.E., Inc.*, 965 F.2d at 858–59.
[105] Opp. 43-44.
[106] *McIntyre*, 514 U.S. at 357.
[107] *Button*, 371 U.S. at 426.
[108] *Id*. at 439.

First Amendment overrode the State of Alabama's desire to investigate violations of its incorporation laws by the NAACP.[109] And *in Americans for Prosperity Found. v. Bonta*, the Supreme Court held that the state's "interest in preventing wrongdoing by charitable organizations" could not justify the chilling effect on First Amendment rights of requiring disclosure of donor lists to the state.[110] So too here, the NYAG's generalized interest in enforcing the charities laws cannot support allowing a suit motivated by animus towards the NRA's advocacy to proceed.

III. <u>THE LOWER COURT WAS WRONG TO SUMMARILY DISMISS THE NRA'S WELL-PLEADED SELECTIVE ENFORCEMENT CLAIMS</u>

The NRA pleads selective enforcement claims under both the First Amendment and Fourteenth Amendment.[111] "[A] First Amendment selective enforcement claim is distinct from an equal protection claim."[112] Importantly, a First Amendment selective enforcement claim does not require an allegation of discriminatory intent.[113] "A First Amendment challenge to speech-infringing enforcement, as with speech-infringing regulation, requires no allegation of bad motive," and "[a] benign purpose does not defeat a claim that the government has

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[109] *Alabama*, 357 U.S. at 451–52, 464–65.
[110] 141 S. Ct. 2373, 2385–86, 2389 (2021).
[111] R-74.166 ("Due to her animus against the NRA, James chose to exercise her discretion to harm the NRA based on the content of the NRA's speech regarding the Second Amendment.").
[112] *Frederick Douglass Found., Inc.*, 2023 WL 5209556 at *12.
[113] *Id*.

selectively enforced the laws in violation of the First Amendment."[114] Thus, "selective enforcement of a neutral and facially constitutional law may run afoul of the First Amendment if the government's prosecutorial choices turn on the content or viewpoint of speech."[115]

Here, the NRA has pleaded that it was subjected to a dissolution action where similarly-situated non-profits were not.[116] It has pleaded in depth that the NYAG has consistently declined to pursue dissolution of a non-profit based on allegations of executive self-dealing or related party transactions.[117]

The NYAG attempts to cite three instances where it has pursued dissolution of a non-profit,[118] but those instances are not similar to this case. In *People v. Fed'n of Multicultural Programs*,[119] dissolution of a non-profit was ordered upon a finding by the court that the corporation was insolvent and unable to discharge its debts. Further, the non-profit had accumulated 27 safety violations and was determined to

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[114] *Id*.
[115] *Id*. at *9.
[116] R-74.141–47.
[117] *Id*. Indeed, examples could be multiplied. Al Sharpton's New York-based non-profit, the National Action Network, has spent nearly $1 million on private jets and limousines for his travel; paid him over $500,000 for "rights" to his "life story"; and gave hefty payments to three of his close family members. The NYAG has taken no adverse action against Sharpton or NAN. Melissa Klein, *Rev. Al Sharpton Gets Giant Raise, and His Charity Spends $1M on Jets, Limos*, N.Y. Post, Nov. 19, 2022, https://nypost.com/2022/11/19/big-bucks-and-private-planes-for-al-sharpton-new-filing/.
[118] Opp. 65.
[119] Index No. 0005671/2015 (Sup. Ct. Albany Cnty. 2016).

be actively harming patients in its care because of a lack of funds.[120] That is not comparable to the NRA's situation here.

Likewise, in *People by James v. Northern Leasing Systems, Inc.*,[121] the court granted dissolution of a non-profit corporation under the upon a finding of "repeated and persistent fraud," finding that the corporation's "method of procuring [equipment leases] both is deceptive in itself and has created an enterprise conducive to fraud." In other words, the non-profit itself was being used for fraudulent purposes. Here, by contrast, the NYAG has never alleged that the NRA itself was being used as an instrument of fraud—only that individual executives had allegedly engaged in self-dealing. Finally, in the case of the Trump Foundation, the dissolution claim was premised on allegations that the Foundation was prohibited from engaging in political activity but had been found to operate as little more than a "checkbook" that was "co-opted" by a presidential campaign—not on allegations of misspending.[122] Further, the Foundation was already in the process of winding down its affairs and consented to dissolution.[123] None of these examples are comparable to this suit.

CONCLUSION

The lower court's decision dismissing the NRA's counterclaims with

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[120] R-74.157.
[121] 70 Misc.3d 256, 267 (Sup. Ct. N.Y. Cnty. 2020).
[122] R-74.157.
[123] *Id*.

prejudice should be reversed and remanded with instructions to deny the NYAG's Motion to Dismiss the NRA's Amended Counterclaims.

Dated: August 18, 2023

By: ____________________

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