IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

NATIONAL RIFLE ASSOCIATION OF AMERICA,	§	
Plaintiff,	§	
v.	§	**CIVIL CASE NO. 18-CV-0566**
ANDREW CUOMO, both individually and in his official capacity; MARIA T. VULLO, both individually and in her official capacity; and THE NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES,	§	**TJM/CFH**
Defendants.	§	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION

Plaintiff the National Rifle Association of America (the "NRA"), by their undersigned counsel of record, hereby submit this memorandum of law, in addition to the declarations of Sarah B. Rogers, John R. Cashin, Arthur R. Miller, and all prior papers and proceedings, in support of its motion, pursuant to Rule 65 of the Federal Rules of Civil Procedure, for a preliminary injunction restraining The New York State Department of Financial Services ("DFS" or the "Department") from initiating enforcement proceedings against the NRA.

I.
PRELIMINARY STATEMENT

The core allegation in this case is that DFS, a banking and insurance regulator charged with preserving the solvency and soundness of financial markets, selectively wielded its powers at the behest of Governor Cuomo to damage the NRA for its political speech. The NRA's claims arise from an investigation commenced by DFS in 2017, based on information provided by an anti-NRA activist group,[1] regarding certain insurance products offered to NRA members. The DFS investigation continued during the pendency of this case, as the NRA never asked the Court to enjoin its progress But now, having learned that the NRA possesses facts and documents which will expose the full extent of its unconstitutional activities, DFS has rushed to commence an administrative proceeding which would usurp the adjudication of key factual issues before this Court—diverting them to a DFS-controlled tribunal rather than an Article III forum and a New York jury. The NRA seeks a preliminary injunction to preserve its day in court.

[1] *See* Am. Compl. ¶¶ 34-37; *see also* ECF No. 154, Notice of Mot. for Leave to File Second Am. Compl. Ex. 1, Proposed Second Am. Compl. ¶¶ 34-37; Declaration of Sarah B. Rogers ("Rogers Decl.") Ex. C, compilation of email communications among DFS and Everytown For Gun Safety ("Everytown"), produced by Defendants in the above-captioned matter (taking credit for instigating DFS's investigation of an NRA-related insurance product, Carry Guard).

This case asserts critical constitutional claims which this Article III Court is uniquely situated to adjudicate. Yet, by design, DFS's enforcement proceeding would raise factual issues overlapping with ones before this Court, and purport to resolve them in a nonpublic forum lacking rigorous procedural or evidentiary safeguards and presided-over by a DFS employee. As Professor Arthur Miller notes in his expert declaration, DFS's conduct implicates the same concerns as conventional forum shopping,[2] and should be met with the same skepticism by this Court. Fortunately, courts in this Circuit recognize a remedy for such gamesmanship. Where, as here, the substance of an imminent or incipient administrative proceeding would "overlap with factual issues" raised by an already-pending federal lawsuit (thereby creating a risk of inconsistent findings), a federal injunction halting the administrative proceeding is warranted.[3] Such is the relief the NRA seeks.

II.
FACTUAL BACKGROUND

A. Like Other Affinity Groups, NRA Sought To Make Affordable Insurance Available To Its Members

Like many affinity groups and organizations nationwide, the NRA seeks to make life, health, and other insurance coverage available to its members on affordable, tailored terms. To this end, the NRA contracted with multiple insurance-industry firms to develop, market, and underwrite insurance programs for NRA members. In connection with these arrangements, the NRA performs none of the functions of an insurer. It does lend its valuable logos, marks, and endorsements to insurance programs brokered and serviced by others. Such "affinity" insurance

[2] *See* Declaration of Arthur R. Miller ("Miller Decl.") ¶¶ 13-15.

[3] *Schoolcraft v. City of New York*, 955 F. Supp. 2d 192, 198 (S.D.N.Y. 2013).

programs are common, and believed by many to be a suitable alternative to employer-based coverage.[4]

From 2000 onward, the NRA contracted with affiliates of the world's largest privately held insurance broker, Lockton Companies, LLC (collectively with pertinent affiliates, "Lockton"),[5] for affinity-program brokerage and administration services. Lockton provided services in the affinity-insurance market for decades and caters to a wide array of industries and numerous clients including franchises, professional and trade organizations, fraternal organizations, and common-cause groups such as the NRA. For roughly seventeen years, Lockton entities administered and marketed NRA-related insurance in New York State and throughout the nation without incident. In addition to its affinity-insurance transactions with the NRA, Lockton has also served for decades as the NRA's trusted insurance broker for various corporate coverage—such as general liability, umbrella and director and officer insurance.

The NRA affinity insurance administered by Lockton consists primarily of property and casualty policies that mirror policies offered by Lockton to other affinity groups. In addition, Lockton administered certain products, including a product known as "Carry Guard," that provided coverage for an array of gun-related expenses, including expenses arising out of the lawful self-defense use of a legally possessed firearm. Illinois Union Insurance Company ("Illinois Union"), a subsidiary of Chubb Ltd., underwrote Carry Guard while doing business under the name

[4] *See, e.g.*, Rachel Louise Ensign, *Affinity-Group Plans*, THE WALL STREET JOURNAL (Sept. 11, 2011), http://online.wsj.com/article/SB10001424053111904836104576563341686006336.html, attached to Rogers Decl. as Ex. J.

[5] In particular, the NRA contracted with Lockton Affinity Series of Lockton Affinity, LLC (f/k/a Lockton Risk Services, Inc.) ("Lockton Affinity") and Kansas City Series of Lockton Companies, LLC ("Lockton KC").

"Chubb." Another insurance broker and administrator, AGIA,[6] contracted with the NRA to provide similar services with respect to life and health insurance. The vast majority of NRA affinity-insurance policies were administered by Lockton and underwritten by Lloyd's.

Lockton and AGIA were (and are) entirely responsible for marketing relevant insurance—drafting website copy, formulating and disseminating direct-mail brochures, staffing call centers, and preparing commercial email content disseminated to members of NRA mailing lists.[7] Consistent with the parties' contracts, Lockton and AGIA marketers availed themselves of NRA logos and trademarks. Such arrangements were, and remain, prevalent throughout the affinity-insurance marketplace, including in New York. For example, similar insurance offerings are made available through the websites of the American Psychological Association,[8] the Fraternal Order of

[6] Association Group Insurance Administrators, Inc. ("AGIA").

[7] *See* Am. Compl. ¶¶ 30-31.

[8] Rogers Decl. Ex. F, Excerpts from the American Psychological Association ("APA") Website (The APA logo is featured prominently alongside the partnering insurance program and gives discounts to APA members.).

Police,[9] the New York State Bar Association,[10] the Sierra Club,[11] the National Education Association,[12] and the Seniors Coalition.[13]

The NRA has been the target of activist boycott efforts in the past, including campaigns that urged Lockton and other insurance-industry firms to cease doing business with the NRA. However, because these campaigns were carried out by non-governmental activist groups who lack the government's power to punish those who refused to join the boycott, their methods have centered on persuasion—not coercion. Unaided by the brute force of state power, activists were not successful in persuading the NRA's banking or insurance partners to sever ties with the NRA. This changed in 2017, when one activist organization successfully enlisted Defendants in a joint offensive against the NRA and the Second Amendment.

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[9] Rogers Decl. Ex. G, Excerpts from the Fraternal Order of Police ("FOP") Website (FOP logo is featured on insurance forms, FOP lists insurance discounts as a benefit of membership, and has its own FOP titled insurance plan.).

[10] Rogers Decl. Ex. H, Excerpts from the New York State Bar Association ("NYSBA") Website (NYSBA lists insurance discounts as a premiere benefit of membership and advertises its affinity insurance program.).

[11] Rogers Decl. Ex. I, Excerpts from the Sierra Club Website (Sierra Club advertises affinity programs for travel and tour insurance offered as a benefit to its members.).

[12] Rogers Decl. Ex. Q, Excerpts from the National Education Association Website (online marketplace of "NEA Member Benefits", including multiple NEA-branded insurance policies such as "NEA Group Term Life Insurance," which are described as "carefully vetted, best-in-class programs;" the site also urges NEA members to purchase specific policies, making statements such as, "Your pets are a part of the family. Help them lead long and healthy lives by having insurance coverage that helps with the high cost of veterinary care.").

[13] Rogers Decl. Ex. R, Excerpts from the Seniors Coalition Website (The Seniors Coalition advertises a "Special Offer on Auto and Home Insurance" exclusive to members of TSC through Liberty Mutual Insurance. On their website, TSC praises Liberty Mutual as being "trusted countrywide for quality coverage and exceptional service." A link is provided instructing those interested to "click for a free quote".).

B. Defendants Intentionally Wield DFS's Regulatory Powers To Advance A Political Vendetta Against the NRA

During or about September 2017, a non-governmental activist organization known as Everytown for Gun Safety ("Everytown") contacted the New York County District Attorney's Office (the "DA's Office"), as well as state and municipal authorities in other jurisdictions, in an effort to prompt sympathetic government officials to target alleged compliance infirmities in Carry Guard. Notably, Everytown is not an organization dedicated to insurance compliance; instead, its explicit political mission is to oppose the NRA.[14] On September 13, 2017, representatives from the DA's Office met with DFS to effectuate Everytown's agenda.[15]

As a result, in October 2017, DFS launched an investigation that focused ostensibly on Carry Guard and was directed in the first instance at Lockton. On its website, Everytown took credit for instigating the inquiry[16]—but even if it had not, the political underpinnings and selective focus of the investigation were clear. In fact, the investigation was chronicled in the national media even before the NRA received official notice of it, and it targeted none of the available self-defense insurance products except Carry Guard, which was marketed to members of the NRA.

Of course, Defendants' true objective was to damage the NRA, not redress purported, technical regulatory infirmities in Carry Guard. Therefore, the scope of the DFS investigation

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[14] Aaron Blake, *Bloomberg launches new $50 million gun control effort*, THE WASHINGTON POST (Apr. 16, 2014), https://www.washingtonpost.com/news/post-politics/wp/2014/04/16/bloomberg-aims-to-spend-50-million-on-gun-control/?noredirect=on&utm_term=.703fe67ee197 (explaining that Everytown "will attempt to combat the vast influence of the National Rifle Association"), attached to Rogers Decl. as Ex. K.

[15] Decl. of Matthew L. Levin, Dk. 28-1, at 2 (July 2, 2018).

[16] Everytown, Moms Demand Action Statements Responding to Report That New York Department of Financial Services is Investigating NRA Carry Guard Insurance, EVERYTOWN FOR GUN SAFETY (Oct. 25, 2017), https://everytown.org/press/everytown-moms-demand-action-statements-responding-to-report-that-new-york-department-of-financial-services-is-investigating-nra-carry-guard-insurance/, attached to Rogers Decl. as Ex. L.

rapidly expanded to encompass programs substantively identical to others in the marketplace, which had nothing to do with firearms or self defense. Importantly, at all relevant times, DFS allegedly knew that it was targeting the NRA for conduct which similarly situated entities engaged in pervasively. As detailed in the NRA's proposed Second Amended Complaint, the NRA believes that the prevalence of these practices throughout the affinity-insurance marketplace played into DFS's threats to Lloyd's and others: if insurance companies failed to blacklist the NRA, DFS could respond by investigating and penalizing other, similar affinity programs just as harshly, generating significant penalties.[17] Against the backdrop of escalating backchannel interactions with Lockton, Lloyd's, and others which are detailed in the NRA's proposed Second Amended Complaint, Defendants during April and May 2018 delivered their intended *coup de grâce*. In a pair of menacing "guidance letters," DFS informed all financial institutions under its jurisdiction that it was bad business in New York to do business with the NRA. Those letters were followed closely by high-profile, multi-million-dollar consent decrees coerced from Lockton and Chubb which underscored Defendants' threat to all DFS-regulated institutions.

Even after [redacted]—*i.e.*, that comparator programs were functionally identical to NRA programs—DFS kept its investigation focused exclusively on the NRA. It was only after this Court sustained selective-enforcement claims by the NRA on November 6, 2018,[18] that DFS grudgingly entered into a second consent order with Lockton that purported to address violations in programs administered for Lockton's

[17] *See* ECF No. 154, Notice of Mot. for Leave to File Second Am. Compl. Ex. 1, Proposed Second Am. Compl. ¶¶ 49-52.

[18] *See* ECF No. 56 at 71-72.

non-NRA clients. Tellingly (and more consistent with historic DFS practice),[19] that second consent decree declined to identify Lockton's non-NRA clients by name, and assessed comparatively minor penalties.[20]

C. DFS's Imminent Enforcement Proceeding Will Overlap With The Subject Matter Of This Case

On May 9, 2019, this Court granted dismissal of the NRA's selective-enforcement claims without prejudice to re-pleading, explaining that although the NRA had adequately alleged unequal treatment of its insurance programs vis-à-vis comparable programs, the NRA must also explicitly plead that Defendants "were aware of such violations by the comparators yet consciously declined" to treat those violations as harshly as NRA-related violations.[21] Thereafter, the NRA sought discovery that would enable it to re-plead its claims robustly, while DFS continued its investigation of the NRA.[22] On December 4, 2019, DFS learned during a court conference that the NRA's discovery efforts had borne fruit, and the NRA would shortly re-plead its selective-enforcement claims.[23] Defendants immediately sprang into action—demanding the identities of anyone who had spoken with the NRA's counsel about the facts newly alleged.[24] Then, on February 5, 2020, DFS formally noticed its administrative proceeding against the NRA via a Statement of Charges and Notice of Hearing.[25] Concerned by the risk of inconsistent adjudications an enforcement

[19] *See* Cashin Decl. ¶¶ 33-36; *see also see also* Rogers Decl. Ex. B, Expert Witness Report of James W. Schacht at 34-36.

[20] *See* Rogers Decl. Ex. B, Expert Witness Report of James W. Schacht at 34-36; *see also* Rogers Decl. Ex. A, Expert Witness Report of John R. Cashin § IV.

[21] *See* ECF No. 112 at 11.

[22] Rogers Decl. ¶ 22.

[23] Rogers Decl. Ex. E, Hr'g Tr. 13:21-14:11.

[24] Rogers Decl. Ex. E, Hr'g Tr. 15:6-15; *see* Rogers Decl. Ex. D, Defendant Maria T. Vullo's First Set of Interrogatories at 4.

[25] Rogers Decl. ¶ 23.

proceeding would pose, the NRA sought to adjourn the proceeding administratively by letter dated February 10, 2020.[26] DFS denied the NRA's request.[27]

DFS's charges present a risk of inconsistent adjudications that would complicate this federal case. In particular, the charges include violations of N.Y. Ins. Law §§ 2102 (dealing with unlicensed solicitation of insurance), 2117 (acting as an agent for an unauthorized insurer), 2122 (advertising for unauthorized insurers), and a "determined violation" under 2402(c) with respect to alleged unfair or deceptive acts or practices.[28] N.Y. Ins. Law §§ 2102 and 2117 impose sliding-scale monetary penalties "up to" $500 per "transaction," with the amount of the penalty determined by the hearing officer.[29] Elements invariably considered at such hearings include the alleged violator's level of culpability—for example, whether the NRA formulated marketing communications itself, or simply relied on templates prepared by Lockton—and whether comparator entities engaged in the same or similar conduct.[30] The administrative tribunal considering those issues would be required to accord deference to DFS,[31] and not required to abide

[26] Rogers Decl. ¶ 25; *id*. Ex. T, Enjoinment Letter dated February 10, 2020.

[27] Rogers Decl. ¶ 26; *id.* Ex. U, Letter Denying NRA's Request dated February 19, 2020.

[28] Rogers Decl. ¶ 23; *id*. Ex. S.

[29] N.Y. Fin. Serv. Law § 301, *et seq.*

[30] *See* Cashin Decl. ¶¶ 19, 22-25.

[31] *See, e.g.*, *Int'l Union of Painters & Allied Trades v. New York State Dep't of Labor*, 32 N.Y.3d 198, 209 (2018) (granting deference to agency's interpretation of statutory language at issue); *see also* Cashin Decl. ¶¶ 20, 22-24.

by any particular procedural or evidentiary rules.[32] Factual determinations made in New York State administrative proceedings could have preclusive effects in federal court.[33]

The likelihood of complications arising from DFS's enforcement hearing, including inconsistent adjudications and potential preclusion of the Court's ability to decide the case before it, is high given the overlap in the claims and factual issues between the intended DFS enforcement proceeding and the case pending before this Court. Indeed, Defendants have, time and again, intentionally and explicitly put into issue—in this case—the NRA's alleged "violations of New York Insurance Law"[34] and "illegal conduct."[35] Having raised those issues here, Defendants should try them here, not commence an overlapping parallel proceeding in a forum they prefer and control.

Clearly, DFS's urgent drive to commence an administrative proceeding at this juncture is no coincidence. Facing the revival of the NRA's selective-enforcement claims, the Department wishes to secure a favorable forum for adjudicating key elements of those claims and avoid a

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[32] N.Y. Fin. Serv. Law § 305(e) (stating that there is no requirement for the Department of Financial Services to observe any formal rules of pleading or evidence during administrative hearings).

[33] *Schoolcraft v. City of New York*, 955 F. Supp. 2d 192, 199 (S.D.N.Y. 2013) (granting a preliminary injunction on the grounds that an administrative adjudication of issues that overlap with those already pending before the federal district court could generate preclusive effects and interfere with the district court's ability to fully adjudicate the issues).

[34] Defs.' Mem. of Law in Supp. of Defs.' Mot. to Dismiss the First Am. Compl. Pursuant to FRCP 12(B)(6), Dk. 40-1, at 1 (Aug. 3, 2018) (accusing the NRA of "distract[ing] from its involvement in various violations of the law" by bringing its First Amendment claims); *see also id*. at 7 ("[t]he NRA's marketing and solicitation . . . are apparent violations of Insurance Law and led DFS to open an investigation into the NRA's unlicensed and unlawful insurance activities, which remains ongoing").

[35] Defs.' Mem. of Law in Opp'n to Pl.'s Req. for Expedited Disc., Dkt. 28, at 1 (July 2, 2018) (accusing the NRA of initiating its First Amendment lawsuit against Defendants as "seeking to thwart DFS's investigation of clear violations of the New York Insurance Law" and "believing that the best defense to its illegal conduct is a good offense . . .").

public trial on the merits. But the constitutional rights at stake in this case, for the NRA and other controversial advocacy groups, are too important to abdicate to a bureaucratic process. Accordingly, the NRA seeks an injunction staying any state enforcement proceeding until its Fourteenth Amendment selective-enforcement and First Amendment retaliation claims are adjudicated.

III.
LEGAL STANDARD

A preliminary injunction is warranted if the movant shows: "(1) a likelihood of irreparable harm; (2) either a likelihood of success on the merits or sufficiently serious questions as to the merits plus a balance of hardships that tips decidedly in their favor; (3) that the balance of hardships tips in their favor regardless of the likelihood of success; and (4) that an injunction is in the public interest."[36] The NRA easily meets this standard.

IV.
ARGUMENT

A. The NRA Will Suffer Irreparable Harm Absent An Injunction.

The Second Circuit has found that a violation of constitutional rights constitutes irreparable harm in a variety of contexts.[37] The rationale for the rule is straightforward: "improper conduct for which monetary remedies cannot provide adequate compensation suffices to establish irreparable

[36] *Chobani, LLC v. Dannon, Co*., 157 F. Supp. 3d 190, 199 (N.D.N.Y. 2016); *see also Am. Civil Liberties Union v. Clapper*, 804 F.3d 617, 622 (2d Cir. 2015) ("A party seeking a preliminary injunction must generally show a likelihood of success on the merits, a likelihood of irreparable harm in the absence of preliminary relief, that the balance of equities tips in the party's favor, and that an injunction is in the public interest.").

[37] *See, e.g.*, *Conn. Dep't of Env't. Prot. v. O.S.H.A.*, 356 F.3d 226, 231 (2d Cir. 2004) (sovereign immunity); *Statharos v. New York City Taxi & Limousine Comm'n*, 198 F.3d 317, 322 (2d Cir. 1999) (right to privacy); *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) (Eighth Amendment); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (religious freedom).

harm,"[38] and the violation of a constitutional right is "difficult to compensate monetarily."[39] For that reason, the Second Circuit has applied the presumption of irreparable harm to alleged violations of the Free Speech and Equal Protection Clauses.[40] Here, the NRA alleges violations of both clauses, and elements of both its First Amendment and its Equal Protection claims overlap with issues sought to be adjudicated administratively: both in a selective-enforcement and a First Amendment retaliation context, the government's treatment of comparator entities is squarely at issue.[41]

Importantly, courts have also found that irreparable harm arises where, as here, allowing the state to commence administrative proceedings would subject the NRA to "additional testimony on the very topics at issue in this pending litigation, but outside the bounds of the judicial process and on defendant's terms."[42] Such harm is particularly acute if the state administrative agency

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[38] *Paulsen v. Cty. of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991).

[39] *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 744 (2d Cir. 2000).

[40] *See id.* at 744-45 (equal protection); *Tunick v. Safir*, 209 F.3d 67, 70 (2d Cir. 2000) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality)) (free speech); *Beal v. Stern*, 184 F.3d 117, 123–24 (2d Cir. 1999) (same); *Bery v. City of New York*, 97 F.3d 689, 693-94 (2d Cir. 1996) (same).

[41] With respect to First Amendment retaliation claims, *see, e.g.*, *Franzon v. Massena Memorial Hosp.*, 32 F. Supp. 3d 528, (N.D.N.Y. 1998) (reversing magistrate's denial of discovery concerning potential disparate treatment of peers in First Amendment retaliation case because admissible evidence in such cases "may well include evidence demonstrating that [the plaintiff] was treated differently" than others similarly situated); *cf.* Am. Compl. at 30-32; *see* ECF No. 154, Notice of Mot. for Leave to File Second Am. Compl. Ex. 1, Proposed Second Am. Compl. at 37-39.

[42] *Schoolcraft v. City of New York*, 955 F. Supp. 2d 192, 199 (S.D.N.Y. 2013) (internal quotations and citations omitted); *see also Mullins v. City of New York*, 554 F. Supp. 2d 483, 486 (S.D.N.Y. 2008) (Failure to enjoin "would allow defendants to compel additional testimony on the very topics at issue in this pending litigation.") (granting preliminary injunction against government action that "threaten[ed] the right to petition the Government via the courts for redress of grievances guaranteed by the First Amendment" (internal quotations and citations omitted)); *Karmel v. City of New York*, 200 F. Supp. 2d 361, 366 (S.D.N.Y. 2002) (plaintiff's participation

conducting the hearing "[is] a party to the instant action [and] . . . stands to sustain significant damage if Plaintiff succeeds in proving his claims, all of which are premised upon the alleged existence of rampant [state government] corruption."[43] Both criteria are satisfied here: the NRA alleges that DFS abused its substantial regulatory powers, designed to ensure the solvency and soundness of financial institutions, in order to suppress and punish political speech. Relegating fact-finding on these issues to a DFS-controlled tribunal would unquestionably constitute irreparable harm.

Moreover, the NRA's only outlet for appealing an adverse determination in an administrative hearing would be a proceeding under Article 78 of the New York Civil Practice Law and Rules—over which federal courts in this Circuit are reluctant to exercise supplemental jurisdiction.[44] The court presiding over the Article 78 appeal would, moreover, be required to accord significant deference to DFS's determinations.[45] Absent an injunction, vital constitutional claims that the NRA pleaded nearly two years ago would be waylaid indefinitely, and could be irreparably compromised, subject to the whims of the exact state agency the NRA has sued. If pivotal factual issues germane to the NRA's constitutional claims were diverted to an administrative tribunal rather than an Article III court, the NRA would also lose access to plenary appellate review—another noncompensable harm.

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in government hearing "without the safeguards of the Federal Rules of Civil Procedure" would "risk . . . prejudicing her action against Defendants" (internal citations omitted)).

[43] *Id*.

[44] *See, e.g.*, *Donley v. Vill. of Yorkville*, No. 614CV1324MADATB, 2019 WL 3817054, at *10 (N.D.N.Y. Aug. 13, 2019).

[45] *See, e.g.*, *Bartolacci v. Vill. of Tarrytown Zoning Bd. of Appeals*, 144 A.D.3d 903 (N.Y. App. Div. 2016) (holding that in an Article 78 proceeding, agency determinations are entitled to judicial deference; judicial review is limited to ascertaining whether the action was illegal, arbitrary and capricious, or an abuse of discretion).

Accordingly, the Court should issue an injunction preserving the status quo until the NRA's claims are adjudicated in the forum where the NRA commenced them, and the one best suited to resolve them: this Court.

B. The NRA is Likely to Succeed on the Merits of Its Claims.

As is described above, Defendants' actions target the NRA because of its views on the right to keep and bear arms. Accordingly, they strike at the heart of the First Amendment in at least two ways: (1) by establishing a regime of implicit censorship in order to suppress the NRA's speech; and (2) by retaliating against the NRA for its advocacy on gun-control issues. Moreover, Defendants' pursuit of the NRA based on its political viewpoint violates the Fourteenth Amendment's guarantee of equal protection of the law, which prohibits targeting entities for enforcement action based on their "exercise of protected statutory and constitutional rights."[46]

Although the NRA is likely to succeed on the merits of all of its claims, the following analysis focuses on the two claims for which the existence of similarly-situated-comparator "violations"—and the government's treatment of the same—are most relevant: First Amendment retaliation, and selective enforcement.

1. The NRA Is Likely to Succeed On The Merits Of Its First Amendment Retaliation Claim

"[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out."[47] To establish a retaliation claim, a plaintiff must show that: "(1) his conduct was protected by the First Amendment, and (2) such conduct prompted or substantially caused

[46] *Wayte v. United States*, 470 U.S. 598, 608 (1985).

[47] *Hartman v. Moore*, 547 U.S. 250, 256 (2006).

defendant's action."[48] A plaintiff alleging retaliation must also demonstrate "either that his speech has been adversely affected by the government retaliation or that he has suffered some other concrete harm."[49]

Defendants' actions plainly manifest all of these elements. There is no doubt that the NRA's advocacy regarding gun-control policy is protected speech.[50] Moreover, Defendants openly targeted the NRA because of its viewpoint on an issue of public concern.[51] Although Defendants may claim that they are only enforcing the insurance laws, that explanation is utterly implausible in light of their express statements emphasizing that Defendants seek to limit banking and insurance activity by "gun promotion organizations"—not organizations party to specific types of affinity-insurance arrangements.[52] Likewise telling are the sanctions imposed in the Lockton, Chubb, and Lloyd's Consent Orders, certain provisions of which prohibit lawful insurance programs endorsed by the NRA yet permit unlawful programs endorsed by non-NRA entities—contrasted with the strikingly lighter sanctions imposed in the second Lockton consent order, with respect to similar conduct involving non-NRA clients.[53] No legitimate enforcement action

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[48] *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 91 (2d Cir. 2002) (citations omitted).

[49] *Dorsett v. Cty of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013).

[50] *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).

[51] *See supra* at 6-8.

[52] *See id.*

[53] For example, the Lockton Consent Order asserts that Lockton violated New York Insurance Law by "advertis[ing] the financial condition of a Chubb insurer by referring to the insurer's AM Best rating" in connection with Carry Guard yet assesses no violations with respect to Lockton's apparently identical conduct vis-à-vis other Lockton-brokered policies. *See* ECF No. 37 Am. Compl. Ex. D, Lockton Consent Order ¶ 12. Nor do the Consent Order's prospective-conduct provisions clarify or limit the range of marketing practices Lockton might permissibly pursue on behalf of non-NRA entities. Meanwhile, the Consent Order prohibits Lockton from "enter[ing] into any agreement or program with the NRA to underwrite and participate in an

targeting alleged insurance-law violations by Lockton, Chubb, and Lloyd's would focus solely on their relationships with the NRA, nor would it result in a prohibition ***solely*** of doing business ***only*** with the NRA, nor would it yield strikingly disparate treatment of identical violations by programs Lockton [redacted]. This transparent attempt to silence the NRA is the essence of retaliation.[54]

Nor can there be any serious question that NRA has suffered concrete harm from Defendants' actions: the NRA lost important business relationships when Defendants demanded that Chubb and Lockton sever ties with the NRA, and Lloyd's terminated key business arrangements with the NRA shortly thereafter, specifically citing Defendants' actions as the reason for its decision. "Allegations of loss of business or some other tangible injury as a result of a defendant's [retaliatory] statements . . . suffice to establish concrete harm," and that kind of loss is present here.[55]

It is well-established that tactics like Defendants' may constitute retaliatory conduct. Courts have held that government officials' statements to the press,[56] harassing investigations,[57] and regulatory action,[58] can all be bases for retaliation claims. Indeed, the retaliatory conduct need

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affinity-type insurance program," irrespective of whether such programs violate New York law. *Id.* ¶ 43.

[54] *See Blankenship v. Manchin*, 471 F.3d 523, 529–30 (4th Cir. 2006) (rejecting official's innocent explanation for his retaliatory actions as "unreasonable").

[55] *Zherka v. Amicone*, 634 F.3d 642, 646 (2d Cir. 2011).

[56] *See Blankenship*, 471 F.3d at 530; *Barrett v. Harrington*, 130 F.3d 246, 263 (6th Cir. 1997).

[57] *See Lacey v. Maricopa Cty.*, 693 F.3d 896, 917 (9th Cir. 2012) (en banc); *White v. Lee*, 227 F.3d 1214, 1238 (9th Cir. 2000).

[58] *See Royal Crown Day Care LLC v. Dep't. of Health & Mental Hygiene of New York,* 746 F.3d 538, 545 (2d Cir. 2014).

not be nearly as serious as Defendants' actions in this case to be actionable.[59] If vague allusions to "additional scrutiny" and alleged regulatory violations are reasonably seen as retaliation as in *Blankenship*,[60] then Defendants' far more explicit threats—to say nothing of the concrete harms already inflicted upon the NRA's business relationships—certainly meet the same standard.

2. The NRA Is Likely To Succeed On The Merits Of Its Selective-Enforcement Claims

Where, as here, "(1) [a] person, compared with others similarly situated, was selectively treated; and (2) [] such selective treatment was based on impermissible considerations such as race, religion, ***intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person***," the Fourteenth Amendment requires relief.[61]

As discovery has already begun to show, Defendants commenced an enforcement action at the behest of an anti-NRA advocacy group which targeted solely NRA-related insurance arrangements. The DFS-regulated institutions that first felt the brunt of Defendants' efforts knew what they were witnessing: an anonymous banker worried that continuing to serve politically polarizing clients would incur DFS's disfavor,[62] and Lloyd's leadership [redacted]

[redacted]

[59] *See Garcia v. City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003) (finding that four $35 parking tickets evidenced retaliatory conduct); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982).

[60] *See Blankenship*, 471 F.3d at 530 (where the governor publicly insisted that additional scrutiny of the plaintiff's business was justified, and that the plaintiff had engaged in regulatory violations which "hopefully they've been able to correct," the plaintiff reasonably feared imminent adverse regulatory action).

[61] *See LeClair v. Saunders*, 627 F.2d 606, 609-10 (2d Cir. 1980) (emphasis added).

[62] Neil Haggerty, *Gun issue is a lose-lose for banks (whatever their stance)*, AMERICAN BANKER (Apr. 26, 2018, 1:11 PM), https://www.americanbanker.com/news/gun-issue-is-a-lose-lose-for-banks-whatever-their-stance, attached to Rogers Decl. as Ex. M.

[redacted].[63] Now, DFS continues to single out the NRA for punishment, without proceeding against any other Lockton client—or any other affinity group—known to have engaged in the same pervasive market conduct. Indeed, a side-by-side comparison of the two consent orders executed between DFS and Lockton should, standing alone, compel a finding of selective enforcement: having discovered that Lockton [redacted] to a wide variety of affinity clients, DFS singled out the NRA for blacklisting and further investigation, leaving Lockton's other clients untouched.[64] If DFS felt that widespread market conduct engaged-in uniformly by the NRA and other affinity groups violated insurance regulations, DFS could have issued clarifying guidance. Instead, DFS warned financial institutions to cut ties with "gun promotion" organizations, on the ground that their political speech "leads to senseless violence."[65] Because differential treatment based on the exercise of First Amendment rights violates the Equal Protection Clause, the NRA is likely to succeed on its equal protection claim.[66]

C. The Balance of the Hardships Favors the NRA.

DFS commenced its investigation of certain affinity insurance programs nearly three years ago, and swiftly exacted penalties from insurance brokers and underwriters (all business partners

[63] *See* ECF No. 154, Notice of Mot. for Leave to File Second Am. Compl. at Ex. G.

[64] *See* Cashin Decl. ¶¶ 32-35 ("Consistent with my experience as an insurance regulator, I find no evidence of proceedings by DFS against any other affinity client."); *see also* Rogers Decl. Ex. B, Expert Witness Report of James W. Schacht at 34-36 ("Moreover, although the Lockton Consent Order and the Supplemental Consent Order address many of these same types of alleged insurance violations, only the Lockton Consent Order names a consumer—the NRA. In other words, it is reasonable to infer that the NRA was singled out by Defendants.").

[65] *See* ECF No. 37, Am. Compl. at Ex. C (Letter from DFS to Financial Institutions dated April 19, 2019, "RE: Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations").

[66] *See Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 40 (2d Cir. 2018); *LaTrieste Rest. & Cabaret Inc. v. Vill. of Port Chester*, 40 F.3d 587, 592 (2d Cir. 1994).

of the NRA) that participated in them. However, DFS did not take the unprecedented, unusual step of proceeding directly against an affinity ***client*** until now—facing the specter of re-pleaded selective-enforcement claims, and public discovery and adjudication of its extraordinary conduct vis-à-vis the NRA. During the time since DFS began its investigation, the NRA lodged serious constitutional claims that have drawn support from senior former insurance regulators, the American Civil Liberties Union, and other academics and commentators.[67] Some of the most important discovery in this case, which the NRA seeks through the Hague regarding DFS's interactions with Lloyd's, remains pending.[68]

If DFS is permitted to proceed with an administrative hearing adjudicating the same issues raised in this case[69] (issues which will be illuminated further by pending discovery), the NRA's ability to prosecute its claims could be gravely compromised, including due to potential collateral-estoppel effects.[70] By contrast, having been permitted to complete the fact-finding portion of its investigation without interference from this Court, DFS will suffer no hardship or prejudice if an enforcement hearing is forestalled pending adjudication of overlapping factual issues already before this Court. Indeed, an injunction would serve the interest of judicial economy, and avoid

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[67] *See* Brian Knight, *Is New York using bank regulation to suppress speech?*, FINREGRAG (Apr. 22, 2018), https://finregrag.com/is-new-york-using-bank-regulation-to-suppress-speech-ac61a7cb3bf, attached to Rogers Decl. as Ex. N; *see also* Kenneth Lovett, *NRA slapping Cuomo with lawsuit over blacklisting campaign, violating First Amendment rights*, NEW YORK DAILY NEWS (May 11, 2018), http://www.nydailynews.com/news/politics/nra-slapping-cuomo-lawsuit-blacklisting-campaign-article-1.3984861#, attached to Rogers Decl. as Ex. O; Molly Prince, *The ACLU Defends the NRA Over Andrew Cuomo's 'Blacklisting Campaign'*, DAILY CALLER (Aug. 25, 2018), https://dailycaller.com/2018/08/25/aclu-defends-nra-against-cuomo/, attached to Rogers Decl. as Ex. P.

[68] *See* ECF No. 129.

[69] *See supra* at 10-11.

[70] *See Matusick v. Erie Cty Water Auth.*, 75 F.3d 31, 49 (2d Cir. 2014) (noting certain factual findings made by an administrative agency precluded plaintiff from arguing otherwise at trial).

undue expense and waste, by averting further litigation that seeks to reconcile the procedural posture and collateral-estoppel implications of parallel, overlapping proceedings.[71]

In the alternative, if it seeks immediate adjudication of its allegation that the NRA violated various provisions of New York Insurance Law, DFS could abide by Fed. R. Civ. P. 13 and plead such claims—which "arise[] out of the [same] transaction or occurrence that is the subject matter of the [NRA's] claim[s]"—before this Court.[72] Although the NRA would be significantly prejudiced if forced to litigate key elements of its constitutional claims in a tribunal controlled by the agency it has sued—a tribunal which lacks robust procedural and evidentiary rules, and which accords *per se* deference to DFS's assertions—there would be no discernible prejudice to the State of New York if its allegations concerning the NRA's affinity-insurance conduct benefit from the full, fair, robust adjudicatory process that federal courts provide.[73]

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[71] *Cf. Schoolcraft v. City of New York*., 955 F. Supp. 2d 192, 200 (S.D.N.Y. 2013) (injunction of departmental proceeding serves the interest of judicial economy by preventing unnecessary, additional litigation).

[72] *See* Fed. R. Civ. P. 13.

[73] The fact that DFS stands to suffer no prejudice or monetary loss also disfavors any requirement of an undertaking or bond. District courts are given "wide discretion to dispense with the bond requirement" of Rule 65. *Deferio v. City of Syracuse*, 193 F.Supp.3d 119, 132 (N.D.N.Y. 2016) (citing Rule 65(c)) (holding no security was necessary where no plausible basis by which not removing protestor from an area would result in damage to the city). Courts in this Circuit have consistently found that where "important constitutional and public policy issues" are implicated and the enjoined party does not stand to suffer monetary loss, no security is required for issuance of a preliminary injunction. *Kermani v. New York State Bd. of Elections*, 487 F.Supp.2d 101, 115 (N.D.N.Y. 2006); *see also Donohue v. Mangano*, 886 F.Supp.2d 126 (E.D.N.Y. 2012) ("given the important potential constitutional issues, the Court, in its discretion, dismisses the bond requirement").

D. An Injunction is in the Public Interest.

Analyzing the public-interest prong of the injunction standard, courts routinely emphasize two considerations—judicial economy[74] and the vindication of constitutional rights[75]—that strongly favor the injunction the NRA seeks. Even if the NRA's allegations of corrupt, politically motivated selective enforcement by Defendants were wholly unfounded (they are not), the extraordinary circumstances of this case would favor a public, transparent forum for adjudicating the NRA's claims and dispelling any appearance of impropriety. The NRA has uncovered, and now seeks to plead, unsettling facts regarding DFS's backroom exhortations to Lloyd's and other financial institutions. Documents and testimony elucidating the truth of these claims should come before this Court, not be buried—or have their discovery forestalled or preempted entirely—by state bureaucratic mechanisms.

V.

CONCLUSION

For the foregoing reasons, the NRA respectfully requests a preliminary injunction enjoining The New York State Department of Financial Services from initiating enforcement proceedings against the NRA.

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[74] *See Schoolcraft*, 955 F. Supp. 2d at 200; *see also Morgan Stanley & Co. v. Seghers*, 2010 WL 3952851, at *7 (S.D.N.Y. Oct. 8, 2010).

[75] *See Paykina ex rel. E.L. v. Lewin*, 387 F. Supp. 3d 225, 245 (N.D.N.Y. 2019) (emphasizing that public interest supports granting preliminary injunction "especially … where constitutional rights are at stake").

Dated: February 28, 2020

Respectfully submitted,

By: */s/ Sarah B. Rogers*

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ATTORNEYS FOR THE NATIONAL RIFLE ASSOCIATION OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

NATIONAL RIFLE ASSOCIATION OF AMERICA,	§	
	§	
Plaintiff,	§	**DECLARATION OF ARTHUR R. MILLER**
	§	
v.	§	
	§	**CIVIL CASE NO. 18-CV-0566**
ANDREW CUOMO, both individually and in his official capacity; MARIA T. VULLO, both individually and in her official capacity; and THE NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES,	§	**TJM/CFH**
	§	
Defendants.	§	

I, Arthur R. Miller, pursuant to 28 USC § 1746, declare as follows:

1. I submit this declaration as an expert witness retained by counsel for Plaintiff the National Rifle Association of America (the "NRA") in the above-captioned matter, and in support of the NRA's application pursuant to Rule 65 of the Federal Rules of Civil Procedure ("FRCP") and Local Rule 7.1 for a preliminary injunction preventing The New York State Department of Financial Services ("DFS") from commencing an enforcement proceeding against the NRA given the litigation pending in this Court which concerns serious claims of Constitutional violations of Plaintiffs' First Amendment rights.

I. Introduction and Qualifications

2. I am a Professor at the New York University School of law. I graduated from Harvard Law School magna cum laude in 1958, was admitted to the New York Bar in 1959 and practiced law in New York City until 1962. Since then, I have taught full time at the University of Minnesota, the University of Michigan, Harvard Law School (where I was the Bruce Bromley

Professor of Law) and, since 2007, New York University School of law (where I am a University Professor). I have taught the basic first year course in Civil Procedure for more than 50 years and advanced courses and seminars in procedure and complex litigation; these courses regularly encompass topics such as constitutional issues, injunctive relief, and the relationships among state and federal courts and judicial and nonjudicial tribunals.

3. I am the author and co-author of more than 40 books and treatises, including Federal Practice and Procedure, the leading multi-volume treatise on practice in federal courts, and New York Civil Practice (with Judge Jack Weinstein and the late Professor Harold Korn), a leading multi-volume treatise on New York practice. I also am the author or co-author of at least 30 law review and other articles on a range of court related issues including United States constitutional law, federal court litigation, civil procedure, sealing orders, discovery, and class actions. I also served as a member of the Special Advisory Group to the Chief Justice of the United States Supreme Court (Chief Justice Burger) on Federal Civil Litigation; as the reporter and then as a member of the Advisory Committee on Civil Rules of the Judicial Conference of the United States (by appointment of Chief Justice Berger and reappointment by Chief Justice Rehnquist); as a special consultant to the original Manual for Complex Litigation; as a member of the American Bar Association Special Committee on Complex and Multidistrict Litigation; and as a member of numerous other professional committees and organizations. I also served as the reporter for the American Law Institute's Complex Litigation Project, which led to the adoption and publication by the Institute of Complex Litigation: Statutory Recommendations and Analysis with Reporter's Study (1994), then as an Advisor to the American Law Institute's Principles of Aggregate Litigation; and was one of the draftsmen of the Uniform Interstate and International Procedure

Act. I have testified before numerous United States Senate and House of Representative subcommittees on constitutional, procedural, privacy, and other issues.

4. Throughout my years in academe, I have maintained my contacts with the Bench and practicing bar in order to understand the actual operation and functioning of the civil justice system. Thus, I have participated in countless judicial conferences in the various United States Courts of Appeal, and in educational programs conducted by the Federal Judicial Center and several state judicial education programs as a lecturer or a discussion leader on a wide variety of subjects, including many on class actions and complex litigation and professional matters. In addition, I have appeared as a lawyer or as an expert in numerous cases, on behalf of both plaintiffs and defendants, with regard to issues such as the propriety of class certification, the fairness, reasonableness and adequacy of settlements and attorneys' fees, subject matter and personal jurisdiction, discovery, choice of law, preemption, jury trial, and appealability. Those cases have involved a wide range of substantive contexts, including mass disasters, product defects, toxic substances, antitrust, security frauds, consumer deception, consumer financing, RICO, mail fraud, wire fraud, Holocaust claims, and professional responsibility. This experience includes oral argument before the United States Supreme Court, all of the United States Courts of Appeal, numerous United States District Courts, and a number of state trial and appellate courts, including New York.

5. I have also been the host of several award-winning television programs that promoted public understanding of the law.

6. My resume, including a list of my publications, is attached hereto as Exhibit A.

7. I am being compensated at my usual hourly rate.

8. I have reviewed the NRA's application for a preliminary injunction, as well as DFS's Statement of Charges and Notice of Hearing, dated February 4, 2020. I have familiarized myself with this matter sufficiently so that I can offer the opinions stated below. My opinion is rendered with respect only to the matters referenced herein and passes no judgment regarding the ultimate merits of any First Amendment, Second Amendment, or Equal Protection matters.

9. This federal constitutional controversy under 42 U.S.C. 1983 has been pending in this court for almost two years. The NRA's claims invoke the First Amendment and the Equal Protection Clause of the United States Constitution and allege violations of those constitutional provisions by a state administrative agency, DFS. These claims require the exercise of dispassionate, apolitical judicial discretion and analysis, which an Article III court affords. By contrast, an administrative proceeding, presided-over by a DFS appointee, is ill suited to adjudicate such claims, or any factual issues germane to them.

10. The risk of preclusive effect arising from inconsistent adjudications in parallel proceedings thoroughly informs the Federal Rules of Civil Procedure and federal common law thereunder. For this reason, if a private civil litigant in Defendants' shoes wished to advance state-law claims hinging on facts that overlapped with those disputed in this proceeding, it would be untenable—certainly inappropriate—for a litigant to forum-shop by starting a subsequent parallel proceeding before a more favorable tribunal.[1] Indeed, this is the type of conduct that the

[1] Indeed, although New York State is a permissive-counterclaim jurisdiction, New York courts accord significant deference to the primacy of federal courts in litigation of issues under federal law and preclude any state-court litigation of claims that could, and should, have been brought in a prior federal proceeding. *See Paramount Pictures Corp v. Allianz Risk Transfer AG*, 31 N.Y.3d 64, 70 (N.Y. 2018) (in ruling that a defendant-turned-plaintiff's claims were precluded because they arose from the same transaction or occurrence as those claims previously asserted in federal court between the parties, held that federal preclusion principles are favored when the prior federal claims encapsulate matters of federal substantive law and promote judicial economy, finality, and consistency); *see also* Wright, Miller, & Cooper, Claim Preclusion—Defendant Preclusion, 18 Fed. Prac. & Proc. Juris. § 4414 (3d ed.) ("Claim-preclusion rules addressed to plaintiffs are mirrored by preclusion rules addressed to defendants" and includes situations that "involve a second action in which a former defendant seeks to advance a claim against the original plaintiff").

compulsory counterclaim rule, embodied in Fed. R. Civ. P. 13(a), aims to prevent.[2] No tenet of civil procedure countenances treating DFS differently than a private civil litigant in this respect.

11. Allowing DFS to avert, preempt, or muddle this Court's adjudication of the NRA's claims by diverting core factual issues to a DFS-controlled tribunal would subject the NRA to irreparable harm. DFS, a defendant in this case, proposes to conduct a summary proceeding, presided-over by a Hearing Officer to be appointed by DFS itself, which offers the NRA no procedural or evidentiary protections yet very well might result in preclusive effect. Although courts may justifiably hesitate to obstruct ongoing regulatory investigations, in this matter it appears that DFS's fact gathering is complete, and adjudicating its allegations is the only step that awaits. So long as applicable statutes of limitations can be tolled, staying state proceedings to allow for the resolution of the NRA's previously filed federal claims would not discernibly prejudice defendants. By contrast, allowing DFS to pursue its present course could gravely prejudice the NRA and, as a matter of precedent, prejudice the constitutional rights of any similarly situated party who finds itself the target of government viewpoint discrimination.

12. It is my understanding that DFS has denied the NRA's request for an adjournment of the administrative hearing, which has been noticed to commence on April 6, 2020. In its letter, DFS asserts that it is the exclusive regulator of the business of insurance in New York, and that the "proper forum" for determining the violations set forth in its Statement of Charges and Notice of Hearing is an "administrative hearing process" before DFS. DFS cites no authority for this proposition, and I know of none. The fact that a regulator may be the exclusive enforcer of certain laws does not necessarily mean that the only forum in which it can enforce those laws is an

[2] *See* Wright, Miller, & Cooper, Claim Preclusion—Defendant Preclusion, 18 Fed. Prac. & Proc. Juris. § 4414 (3d ed.) ("Potential subsequent litigation so close to the first action as to present questions of defendant preclusion ordinarily arises out of the transaction or occurrence that [was] the subject matter of the first action, and is foreclosed by direct operation of Rule 13(a)" (internal citations and quotations omitted)).

administrative proceeding before that regulatory body. Indeed, courts are, and have long been, tasked with adjudicating claims and enforcing all types of laws. This federal court is fully capable of, and best-suited to, preside over the claims and issues DFS intends to bring and simultaneously determine and protect the constitutional values advanced by NRA.

II. Federal Rule 65

13. Generally, federal courts are empowered to issue preliminary injunctions to protect a movant from irreparable injury and to preserve the court's power to render a meaningful decision after a full and fair opportunity by each party to present its case.[3] Courts have historically turned to principles of equity and fairness in evaluating the necessity of a preliminary injunction for the purpose of preventing harm to the moving party. Also of paramount importance is the need to prevent the judicial process from being rendered futile by a party's attempt to take pre-emptive actions. When an injunction is required to preserve the court's power to decide the case before it, a preliminary injunction is appropriate.[4]

14. The Second Circuit's articulation of the general approach to a preliminary injunction provides that the requesting party must show a likelihood of irreparable harm; either a likelihood of success on the merits or sufficiently serious questions as to the merits plus a balance of hardships in their favor; or that the balance of hardships tips in their favor regardless of the likelihood of success; and that an injunction is in the public interest.[5]

III. Irreparable Harm

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[3] *See* Wright, Miller, & Kane, Purpose and Scope of Preliminary Injunctions, 11A Fed. Prac. & Proc. Civ. § 2947 (3d ed.).

[4] *See id.*

[5] *See Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 895 (2d Cir. 2015).

15. The threat of irreparable harm is the single most important aspect of a preliminary injunction inquiry. Some possibility of remote future injury is not enough. Instead, movant must show that if the threatened action is not enjoined, there is a strong (although not certain) likelihood of injury that cannot be undone.[6]

16. When there is a prima facie entitlement to relief from violations of a constitutional right, irreparable harm is presumed, and no separate showing of harm is necessary.[7] When a party alleges the violation of its rights under the Free Speech and Equal Protection Clauses of the United States Constitution, courts in this Circuit have recognized that the interests involved are enormously important, and the potential harms are correspondingly grave.[8] The NRA asserts that its constitutional rights have been violated by DFS. Subjecting the NRA to an enforcement proceeding before the very agency the NRA has alleged violated its rights surely amplifies already serious injuries.

17. Prejudice to, and improper disclosure of information by, the moving party may also constitute an irreparable harm. Administrative proceedings, although quasi-judicial in nature, are not governed by the Federal Rules of Civil Procedure or Evidence, are not presided over by Article III judges, and do not necessarily operate according to commonly accepted judicial standards and practices. Allowing a government agency involved in litigation against its regulatory target to subject its adversary concurrently to its own proceedings conducted by its own personnel,

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[6] *See* Wright, Miller, & Kane, Grounds for Granting or Denying a Preliminary Injunction—Irreparable Harm, 11A Fed. Prac. & Proc. Civ. § 2948.1 (3d ed.).

[7] *See Donohue v. Paterson*, 715 F.Supp.2d 306, 315 (N.D.N.Y. 2010).

[8] *See, e.g., New York Progress and Protection PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013) ("The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury"); *Brewer v. West Irondequoit Cent. School Dist.*, 212 F.3d 738, 744-45 (2d Cir. 2000) (equal protection violations constitute irreparable harm).

governed by the agency's own rules with the stated goal being enforcement, clearly will result in prejudice to the target that would be avoided in this Court.[9]

18. For instance, if DFS were permitted to commence its noticed proceeding, it certainly would seek to elicit testimony from the NRA. This testimony is not governed, as it would be in this Court, by the Federal Civil or Evidence Rules or the wisdom and experience of a federal judge. Once testimony is improperly elicited, it cannot be taken back. Moreover, DFS may base a determination, even in part, on that testimony. This allows DFS—a litigant in a pending proceeding arising from the same facts and circumstances—to gain a prejudicial advantage over its adversary that it could not otherwise gain because of the availability of procedural safeguards. All of these considerations are especially salient in this case, because, even if the NRA were to initiate an Article 78 proceeding to challenge a DFS determination, the New York state court reviewing the administrative decision would give substantial deference to DFS,[10] further prejudicing the NRA irreversibly. The possibility of this prejudicial consequence constitutes a very real threat of irreparable harm.[11]

IV. Likelihood of Success on the Merits and Balance of Hardships

19. In order to enjoin a governmental action, the movant must show that it is likely to succeed on the merits. Courts in this Circuit and District have indicated that the likelihood-of-success inquiry depends on the allegations and evidence taken as a whole. Ultimately, if there is

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[9] *See Schoolcraft v. City of New York*, 955 F.Supp.2d 192, 199 (S.D.N.Y. 2013); *see also Mullins v. City of New York*, 554 F.Supp.2d 483, 491 (S.D.N.Y. 2008) (Failure to enjoin "would allow defendants to compel additional testimony on the very topics at issue in this pending litigation.") (granting preliminary injunction against government action that "threaten[ed] the right to petition the Government via the courts for redress of grievances guaranteed by the First Amendment" (internal quotations and citations omitted)); *Karmel v. City of New York*, 200 F.Supp.2d 361, 366 (S.D.N.Y. 2002) (plaintiff's participation in government hearing "without the safeguards of the Federal Rules of Civil Procedure" would "risk . . . prejudicing her action against Defendants" (internal citations omitted)).

[10] *See B.L. v. Lawsky*, 171 A.D.3d 401, 402 (1st Dep't 2019).

[11] *See Schoolcraft*, 955 F.Supp.2d at 199.

a reasonable inference from those allegations and evidence that, for instance, unconstitutional conduct occurred, the movant has satisfied this prong of the preliminary injunction standard.[12] A review of the factual record in this case, reinforced by DFS' efforts to bypass this Court's jurisdiction over the claims before it, leads me to the conclusion that the NRA may well succeed on its retaliation and selective enforcement claims.

20. Threats to a party's constitutional and procedural rights are almost universally recognized as outweighing conflicting interests affected by an injunction.[13] By contrast, although an agency's interest in enforcing statutes or regulations is of course an important concern, the weight a court should afford such a state interest is lessened when the agency is already involved in pending litigation that allows it to assert those same interests. DFS is already before a competent tribunal that is capable of enforcement and therefore carrying out those same state interests. The NRA merely believes that DFS should advance the same claims in this Court that it would assert in an administrative forum it controls.

21. In addition, allowing an agency to conduct an administrative proceeding on claims arising from the same facts and issues[14] pending before a court risks issue preclusion and potential divestiture of the court's ability to decide the issues before it fully and fairly.[15] When a state

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[12] *See Chestnut Hill NY, Inc. v. City of Kingston*, 2017 WL 11418271, at *2 (N.D.N.Y. Feb. 22, 2017).

[13] *See* Wright, Miller, & Kane, Grounds for Granting or Denying a Preliminary Injunction—Balancing Hardship to Parties, 11A Fed. Prac. & Proc. Civ. § 2948.2 (3d ed.) ("when plaintiff is claiming the loss of a constitutional right, courts commonly rule that even a temporary loss outweighs any harm to defendant and that a preliminary injunction should issue").

[14] A review of the record in this case makes clear that the Defendants have put directly into issue the NRA's alleged violation of New York Insurance Law. *See, e.g.*, Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss the First Amended Complaint Pursuant to FRCP 12(B)(6), Dk. 40-1 (Aug. 3, 2018); Defendants' Memorandum of Law in Opposition to Plaintiff's Request for Expedited Discovery, Dkt. 28 (July 2, 2018).

[15] *See Schoolcraft*, 955 F.Supp.2d at 199 (granting a preliminary injunction when, if an administrative hearing were conducted on similar issues also before the federal district court, the findings of the administrative body would have a preclusive effect and interfere with the district court's ability to adjudicate the issues fully).

administrative body makes a quasi-judicial decision on a specific issue, collateral estoppel or issue preclusion may give preclusive effect to the determination.[16] When such determinations *are* given preclusive effect, the result is that a party may be bound by them in its previously instituted litigation, which effectively usurps the court's role. On the other hand, when a court rules differently than the administrative body, the target may be subject to conflicting judgments or determinations that may result in litigation to determine which case is governing. Either way, the target of the administrative proceeding suffers.

V. Public Interest

22. As discussed, the protection of constitutional rights is routinely recognized as a significant public interest.[17] Allowing government agencies involved in litigation with parties that are subject to those same agencies' regulatory powers to drag those parties into an administrative proceeding clearly presents basic equity issues, at best, and more likely renders the judicial process pointless, at worst. The government should not be in the business of evading pending litigation in federal courts in favor of fora it deems more hospitable.

23. Courts also routinely recognize that the preservation of government and judicial resources is in the public interest.[18] Allowing the initiation of a secondary proceeding when one is already underway in a federal court that has jurisdiction is needlessly wasteful.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

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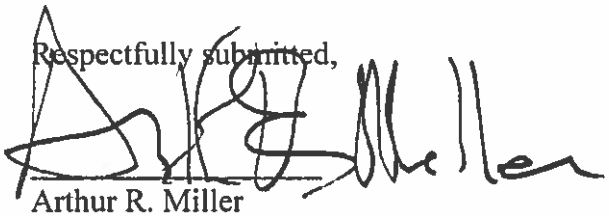
[16] *See Matusick v. Erie County Water Authority*, 757 F.3d 31, 49 (2d Cir. 2014) (finding certain factual findings by an administrative agency precluded plaintiff from arguing otherwise at trial).

[17] *See Paykina on behalf of E.L. v. Lewin*, 387 F.Supp.3d 225, 245 (N.D.N.Y. 2019) (the need to grant a preliminary injunction to support the public interest is "especially true where constitutional rights are at stake").

[18] *See Schoolcraft*, 955 F.Supp.2d at 200; *Morgan Stanley & Co., Inc. v. Seghers*, 2010 WL 3952851, at *7 (S.D.N.Y. Oct. 8, 2010).

Dated: February 26, 2020

Respectfully submitted,

By: 

Arthur R. Miller

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

NATIONAL RIFLE ASSOCIATION OF AMERICA,	§	
	§	
Plaintiff,	§	**DECLARATION OF JOHN R. CASHIN**
	§	
v.	§	**CIVIL CASE NO. 18-CV-0566**
	§	
ANDREW CUOMO, both individually and in his official capacity; MARIA T. VULLO, both individually and in her official capacity; and THE NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES,	§	**TJM/CFH**
	§	
Defendants.	§	

DECLARATION OF JOHN R. CASHIN
IN SUPPORT OF APPLICATION FOR PRELIMINARY INJUNCTION

I, John R. Cashin, pursuant to 28 USC § 1746, declare as follows:

1. I am John R. Cashin. I am an attorney in private practice, a semi-retired insurance company executive and former Deputy Superintendent of Insurance for the State of New York.[1] My business address is 122 Cedar Bluff Road, Stillwater, New York.

2. I have personal knowledge of each of the facts set forth herein, and could and would competently testify thereto, if called upon to do so.

3. I make this declaration pursuant to Federal Rule of Civil Procedure 65 and Local Rule 7.1, in support of the National Rifle Association of America (the "NRA")'s Application for Preliminary Injunction.

[1] The predecessor of the Department of Financial Services.

Introduction and Qualifications

4. I have expertise in insurance law and regulation, as well as the industry customs and practices related to the imposition of fines, penalties and licensing of insurance companies, brokers and affinity program managers. I have provided expert witness testimony in the area of insurance regulation on several prior occasions.

5. I have an MBA from City University of New York, a JD from Fordham Law School and an LLM from New York University. Throughout my 45-year career, I have held various roles in the insurance industry as a supplier, a legislative counsel, a reinsurance broker, regulator, outside and in-house counsel.

6. From 1968 to 1978, I held sales and system engineering positions with the IBM Company focusing exclusively on the property/casualty insurance industry. From 1979 to 1980, I served as counsel to the New York State Senate Insurance Committee. In that role I drafted and consulted on laws and regulations pertaining to insurance companies, agents and brokers operating in New York State.

7. From 1980 to 2000, I worked at the three largest insurance brokerages, namely, Marsh, AON and Willis. During this period, I focused on placing reinsurance for property/casualty insurers throughout the United States. My principal clients included, AIG, Chubb, Travelers, Hartford, Met P&C, and Nationwide.

8. From 2000 to 2001, I served as Deputy Superintendent of Insurance for what was then known as the New York State Insurance Department (which is now a part of the New York Department of Financial Services). There, I was responsible for the Property Bureau which had regulatory oversight of property/casualty insurers, agents and brokers. I oversaw several

enforcement proceedings, including by conducting enforcement hearings as an Insurance Department hearing officer.

9. From 2001 to 2004, I was Special Counsel at the law firm of Stroock and Stroock and Lavan. At Stroock, I provided insurance regulatory compliance advice and guidance to insurance and reinsurance companies, insurance agents and brokers.

10. From 2004 to 2014, I worked in a variety of legal and compliance roles at the Zurich Group which is one of the world's top ten general insurance companies. The positions I held at Zurich are as follows: General Counsel Group Reinsurance (2004-2006), General Counsel International Business (2006-2007), Group Chief Compliance Officer (2007-2010), General Counsel Middle East and Africa (2011-2013) and General Counsel General Insurance (2013-2014).

11. Since retiring from Zurich in 2014, I have maintained a part-time law practice focused on insurance and reinsurance arbitrations and expert witness testimony. In September 2015, I was appointed to serve on the Inquiry Panel Member for the Central Bank of Ireland ("Central Bank"), where I determine culpability and assess penalties against institutions and individuals charged by the Central Bank with violations of the Financial Services Laws of Ireland and the European Union.

12. Over the course of my career I have provided regulatory compliance guidance, reviews and internal risk assessments of insurance policy forms, distribution agreements and compensation structures.

Assignment

13. I have been retained to opine regarding substantive and procedural aspects of enforcement hearings conducted by the New York State Insurance Department and its successor,

DFS, pursuant to New York Ins. Law §§ 2102 and 2117. I am being compensated at my standard hourly rate of $450.00.

14. In addition, I was previously retained by the NRA to review and evaluate the conduct and actions taken by Defendants, Maria T. Vullo ("Vullo"), The New York State Department of Financial Services ("DFS") and Governor Andrew Cuomo ("Cuomo") in relation to the investigation, fines, penalties, restrictions and prohibitions imposed on the NRA and those licensed insurance companies and insurance brokers, Lockton Affinity, LLC ("Lockton Affinity"), Chubb Group Holdings, Inc., ("Chubb"), Illinois Union Insurance Company ("Illinois Union") and Certain Underwriters at Lloyd's London ("Lloyd's"), companies that provided insurance products and services to the NRA.

Documents Reviewed

15. I have reviewed the operative pleadings in this case, as well as the NRA's proposed Second Amended Complaint filed December 20, 2019 at dkt. no. 154-1.

16. I have reviewed all of the Consent Orders posted on DFS's website for the period from 2014 to present.

17. I have reviewed the Statement of Charges and Notice of Hearing issued by DFS with respect to the NRA on February 4, 2020.

18. I have reviewed all of the Disciplinary Actions Against Companies, Agents, Brokers, and Adjusters posted on DFS's website for the period from 2014 to present.

Opinions

19. In an administrative enforcement proceeding conducted by DFS regarding purported violations of New York Insurance Law §§ 2102 and 2117, the parties are highly likely to present evidence, and the hearing officer is highly likely to make factual determinations,

regarding: (i) whether, and to what extent, comparable conduct occurred in the marketplace; and (ii) if violations occurred, whether similarly situated violators were treated similarly by New York State. In other words, it is highly likely that such a proceeding would adjudicate factual issues overlapping with those before this Court.

20. An administrative enforcement proceeding conducted by DFS would provide materially fewer procedural protections for the NRA than a federal civil litigation, and provides no guarantee of impartiality.

21. DFS's actions with respect to NRA-related affinity insurance programs continue to reflect a harsh, disparate enforcement approach. Notably, it is unprecedented for New York insurance regulators to seek to penalize an insurance customer or client, such as the NRA.

Opinion No. 1: A DFS Administrative Proceeding Against The NRA Is Highly Likely To Adjudicate Factual Issues Overlapping With Those Before This Court.

22. I have considered two New York insurance statutes in connection with this report: N.Y. Ins. Law § 2102 (Acting without a license), and N.Y. Ins. Law § 2117 (Acting for or aiding unlicensed or unauthorized insurers or health maintenance organizations).

23. Both statutes provide for sliding-scale monetary penalties per violative "transaction." In particular, § 2102(g) provides that "[a]ny person, firm, association or corporation who or that violates this section shall be subject to a penalty not to exceed five hundred dollars for each transaction;" similarly, § 2117(g) provides that "[a]ny person, firm, association or corporation violating any provision of this section shall, in addition to any other penalty provided by law, forfeit to the people of the state the sum of five hundred dollars for each transaction."

24. When penalties are assessed pursuant to these and similar provisions of New York Insurance Law, one key factual consideration is whether the allegedly violative conduct was engaged in by others in the marketplace; relatedly, the hearing officer considers whether, and to

what extent, similarly situated violators were penalized. If a party charged with violations asserted selective-enforcement and retaliation arguments akin to those asserted by the NRA in this case, the party would effectively be forced to plead and adjudicate those arguments within the confines of the administrative hearing, lest a penalty be assessed which failed to consider such arguments. Similarly, regulatory counsel would be expected to present evidence of comparative fines and penalties levied for comparable conduct. Based on my experience conducting such hearings and my review of the NRA's pleadings and proposed amended pleading, it is my opinion that any DFS adjudicatory procedure regarding purported violations of N.Y. Ins. Law § 2102 or § 2117 would be highly likely to involve factual issues overlapping with those before the Court.

Opinion No. 2: A DFS Administrative Proceeding Provides Fewer Procedural Safeguards For The NRA Than A Federal Court, And Provides No Impartial Tribunal.

25. Historically, the DFS and its predecessor, the New York Department of Insurance, adjudicated alleged violations of New York insurance statutes under a hearing procedure prescribed in Part 4 of 11 NYCRR. However, effective December 17, 2019, DFS announced that it was "presently engaged in a number of critical investigations and enforcement activities for which it intends to hold hearings," and that it desired to hold such hearings under an amended regulatory procedure. Accordingly, on an emergency basis, DFS repealed the previous rules governing administrative adjudicatory proceedings for banking and insurance matters and replaced them with a new regulation, added to 23 NYCRR, to avoid "delay[]" in bringing hearings related to unnamed pending investigations.[2]

26. Although the new hearing procedures largely mirror those provided previously under New York's insurance regulations, some alterations have been made that could be construed

[2] 2019 NY REG TEXT 542760 (NS) (Emergency Proposed Rulemaking).

as unfavorable for a hearing respondent, such as the NRA. For example, the sequence of opening and closing arguments has been structured to favor DFS, with DFS receiving rebuttal opportunities not afforded to the NRA.[3]

27. Under current hearing procedures, the hearing officer presiding at the hearing will be "chosen from among the following persons: (1) the Superintendent of Financial Services; (2) any Deputy Superintendent; or (3) any designated salaried employee of the Department authorized by the Superintendent for such purpose."[4] Accordingly, there is no impartial tribunal.

28. Discovery is available only to the extent permitted by State Administrative Procedure Act sections 301, 305, and 401.4, and DFS rules promulgated thereunder.[5] Section 301.2 entitles the NRA only to a short and plain statement of matters asserted by DFS; upon application by the NRA, if DFS finds that the statement it provided the NRA was not sufficiently definite or detailed, it may at its discretion expand its statement. DFS's determinations regarding the amount of information it provides to the NRA are explicitly shielded from judicial review.[6] DFS may also, at its discretion, promulgate additional discovery rules.[7] However, unless DFS chooses to enact an enabling rule, the NRA would be left with far fewer mechanisms to gather evidence from DFS, or other witnesses, than would be available to the NRA in federal court.[8]

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[3] N.Y. Comp. Codes R. & Regs. tit. 23, § 2.11(b).

[4] N.Y. Comp. Codes R. & Regs. tit. 23, § 2.2.

[5] N.Y. Comp. Codes R. & Regs. tit. 23, § 2.6.

[6] *See* State Admin. Proc. Act. § 301.2.

[7] *See* State Admin. Proc. Act. § 305.

[8] N.Y. Fin. Serv. Law 305(d) allows the NRA to inspect evidence presented by DFS, and to present evidence already in the NRA's possession. However, this is distinct from discovery mechanisms available in federal court, which permit the NRA to compel disclosure of additional evidence possessed by DFS or other witnesses which may aid the NRA's defense.

29. There are no rules of evidence governing administrative adjudicatory procedures before DFS. It is my experience that the hearing officer admits and excludes evidence at his or her discretion.

30. The hearing officer generally accords significant deference to the agency's interpretation of relevant insurance statutes and its view of the respondent's conduct.

31. The respondent in such a hearing may appeal the hearing officer's determination to the New York State Supreme Court pursuant to Article 78 of the New York Civil Practice Law and Rules. However, the court would be required to confine its judicial review to the evidence which DFS permitted to be adduced in the administrative hearing,[9] and could not consider new issues or arguments.[10]

Opinion No. 3: DFS's Actions Continue To Reflect A Disparate Enforcement Approach

32. In my previous expert report dated March 19, 2019, I opined that DFS's approach to NRA-related affinity insurance programs represented an unprecedented departure the agency's traditional practice of reformation and compliance, especially in situations where there is no evidence of harm to consumers. For example, insurers and excess-line brokers not doing business with the NRA were punished considerably less than the NRA's brokers and underwriters, for similar violations.

[9] *See, e.g.*, *ABN AMRO Bank N.V. v. Dinallo*, 962 N.Y.S.2d 854, 867 (Sup. Ct. 2013)("[A] fundamental tenet of CPLR article 78 review is that [j]udicial review of administrative determinations is confined to the facts and record adduced before the agency.")(internal citations and quotation marks omitted). Often cited in cases involving judicial review of agency rulemaking, this principle applies equally in Article 78 appeals which challenge hearing outcomes.

[10] *See, e.g.*, *Fireman's Fund Ins. Co. v. Corcoran*, 156 A.D.2d at 167.

33. At the time I rendered my previous expert report, I was not aware of any indication that DFS intended to charge the NRA directly with violations of New York Insurance Law. Such charges would mark yet another unprecedented departure from New York's historic treatment of similar insurance-market conduct. During my tenure at DFS's predecessor agency, as well as in the context of DFS consent orders and enforcement actions undertaken in recent years, the regulator's general objective was to supervise insurance-industry firms and protect their customers. As an affinity client of Lockton, Chubb, and Lloyd's, the NRA would traditionally be viewed as the "customer" in this situation. I have reviewed all of the Consent Orders posted on DFS's website for the period from 2014 to present, and all of the Disciplinary Actions Against Companies, Agents, Brokers, and Adjusters taken by DFS during the same period. Consistent with my experience as an insurance regulator, I find no evidence of proceedings by DFS against any other affinity client.

34. Rather, DFS enforcement efforts have historically focused on licensees. The business of insurance is regulated by the fifty states. Each state has its own set of laws, regulations and enforcement mechanisms relative to the solicitation, sale and administrations of insurance products within its borders. Affinity insurance programs are multi-party arrangements typically between membership organizations, licensed insurance intermediaries and licensed insurance carriers. Membership organizations are unsophisticated parties relative to these insurance laws and regulations and are, therefore, dependent on the knowledge and experience of their licensed partners for guidance and supervision of their activities relative to the administration of the affinity program. Due to this complex regulatory environment, the administration, supervision and responsibility of the affinity program is vested in the licensee.

35. The DFS has direct regulation of licensees in granting their license to operate in New York and in the periodic review of their renewal applications. By virtue of their license application, licensees profess to have knowledge of the insurance laws and regulations and agree to conduct their activities in conformity with those laws and regulations. Membership organizations like the NRA make no such profession nor commitments and should not be held, nor have they historically been held, to the same level of accountability as licensees. That pattern appears to hold true in this case: except for the NRA, DFS has not proceeded against any of Lockton's non-licensee affinity clients.

36. In New York, the permissible activities of a membership organization participating in an affinity insurance program are limited to referrals to a licensee and cannot extend beyond referral to the solicitation or sale of insurance. The distinction between "referral" and "solicitation" is a very fine line, and exactly the type of nuanced technical issue which licensees (like Lockton) are expected to monitor, in order to protect clients (like the NRA) who rely on their expertise. Proceeding against Lockton's client in this situation is extraordinary and, by all indications, unprecedented.

37. In forty-five years of experience as a property/casualty industry practitioner, including my years as a senior New York insurance regulator, I have never witnessed hostilities against an affinity client that are comparable to those directed by DFS at the NRA.

I swear under penalty of perjury that the foregoing is true and correct.

Dated: February 24, 2020

Respectfully submitted,

By: John R. Cashin
John R. Cashin