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,

– against –

THE NATIONAL RIFLE ASSOCIATION OF AMERICA,

Defendant-Appellant,

– and –

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

Defendants.

Appellate Case No.: 2022-05185

BRIEF FOR DEFENDANT-APPELLANT

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I. PRELIMINARY STATEMENT

Does the First Amendment allow a court to impose a compliance monitor on a non-profit advocacy group at the behest of a state official who has expressed the intent to destroy the group in retaliation for its First Amendment-protected speech?

The answer to that question is "no." A monitor may not be imposed on a non-profit over its substantial objection at the urging of a state official with a punitive, retaliatory purpose. Nor do courts have the inherent power to impose a compliance monitor on a party over its substantial objection.[1] The forced imposition of a compliance monitor on an advocacy group is a "coercive sanction"[2] not allowed by the First Amendment.

The First Amendment prevents state officials from wielding regulatory power to punish a disfavored civil rights organization for its advocacy.[3] Relevant here, the U.S. Supreme Court has repeatedly struck down regulatory regimes that target disfavored advocacy groups by seeking to require them to disclose sensitive information to a state-appointed regulator.[4]

Most recently, in *Americans for Prosperity Foundation v. Bonta*, the Court

[1] *Cobell v. Norton*, 334 F.3d 1128, 1140–41 (D.C. Cir. 2003).
[2] *Acosta v. Paragon Contractors Corp*., 884 F.3d 1225, 1238–39 (10th Cir. 2018).
[3] *See NAACP v. Button*, 371 U.S. 415, 437–38 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–62 (1958) ("*Alabama*").
[4] *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2387–89 (2021), *Alabama*, 357 U.S. at 462–63.

struck down California's requirement that non-profits disclose the identity of their donors to the California Attorney General.[5] Applying "exacting scrutiny," the Court held that the requirement violated the First Amendment on its face because it burdened the associational rights of donors and the non-profits they wished to support. In addition, the requirement violated the First Amendment as applied to non-profits that "had suffered from threats and harassment in the past" and whose donors, employees and contractors "were likely to face similar retaliation in the future if their affiliations became publicly known."[6]

Here, New York Attorney General Letitia James ("NYAG" or "James") seeks the appointment of "an independent compliance monitor with responsibility to report to the Attorney General and the Court to ensure the proper administration of" the NRA's assets.[7] She also seeks the appointment of "an independent governance expert to advise the Court on reforms necessary to the governance of the NRA to ensure the proper administration of charitable assets."[8]

The NYAG's requests for the appointment of a compliance monitor and "governance expert" come after her attempt to dissolve the NRA altogether failed.[9] The NYAG has repeatedly declared that the NRA is a "terrorist organization" and a

[5] *Americans for Prosperity*, 141 S. Ct. at 2383.
[6] *Id.* at 2381.
[7] R. at A-7.178.
[8] *Id.*
[9] *Id.* at A-7.161.

"criminal enterprise."[10] In addition, the NYAG has long history of seeking to obtain confidential and sensitive information from her political opponents—including donor information—with observing proper security precautions, with the result that sensitive and confidential information regarding those groups has been leaked to the press, exposing donors and supporters to reprisals.[11]

Taken together, these facts show that imposing a monitor on the NRA would create an unconstitutional chilling effect on current and future NRA donors, members, supporters, contractors, and employees. Like the advocacy groups in *Alabama* and *Americans for Prosperity*, the NRA's leadership, board members and employees are routinely subjected to harassment and death threats.[12] And both the NRA as an entity and its associated contractors, employees, and supporters are often confronted with boycott efforts.[13]

Further, the NRA frequently litigates Second Amendment and other gun rights suits against James.[14] Allowing the imposition of a compliance monitor creates an

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[10] R. at A-7.362.

[11] *See* Section III.E *infra*.

[12] R. at A-7.59; *see also* Complaint (Verified) for Injunctive Relief & Damages, *Hammer v. Sorensen et al.*, Index No. 4:18-CV-00329 (N. D. Fla. July 13, 2018) (describing "campaign of hate and vitriol" directed against NRA Board Member Marion Hammer in order to "try to humiliate and intimidate" her).

[13] National Rifle Association of America's Second Amended Complaint and Jury Demand, at p. 15, *NRA v. Vullo*, No. 18-CV-00566-TJM-CFH, ECF No. 203 (N.D.N.Y June 2, 2020), *available at* https://www.nralegalfacts.org/_files/ugd/91713c_df1d7f0ec8014b8fb35275605c6bcc8d.pdf.

[14] *NRA-ILA Spring 2023 Litigation Newsletter*, NRA-ILA, April 7, 2023, https://www.nraila.org/articles/20230407/nra-ila-spring-2023-litigation-newsletter (noting pending NRA litigation against New York); *New NRA-ILA Backed Lawsuit Challenges New York's*

intolerable risk that its litigation strategy and litigation expenditures will be subject to oversight by its opponent in court—the NYAG.

Under *Alabama* and *Americans for Prosperity*, the NYAG's request for "appointment of an independent compliance monitor with responsibility to report to the Attorney General" must be subjected to "exacting scrutiny."[15] She cannot satisfy that "exacting" standard, and indeed has made no attempt to do so.

Further, a compliance monitor and governance expert would "intru[de] into the internal structure or affairs of" the NRA, forcing it to accept oversight from officials "it does not desire."[16] The NRA has a First Amendment right to be governed "only by employees who sincerely share its views."[17] Forcing it to be overseen in its administration of assets and governance by an official "with responsibility to report to the Attorney General and the Court,"[18] and not merely the NRA's members, triggers strict scrutiny under the First Amendment.[19] The NYAG's requests cannot survive such scrutiny.

Finally, the relevant statutory code, the Estates, Powers & Trusts Law

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Unconstitutional Carry Restrictions, NRA-ILA, Aug. 31, 2022, https://www.nraila.org/articles/20220831/new-nra-ila-backed-lawsuit-challenges-new-yorks-unconstitutional-carry-restrictions.

[15] *Americans for Prosperity*, 141 S. Ct. at 2383.

[16] *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

[17] *Slattery v. Hochul*, 61 F.4th 278, 288 (2d Cir. 2023).

[18] R. at A-7.164.

[19] *Slattery*, 61 F.4th at 287 (cleaned up).

("EPTL"), contains a detailed remedial scheme that nowhere authorizes the appointment of a compliance monitor or governance expert.[20]

The NYAG's requests for a compliance monitor and governance expert must be dismissed as a matter of law.

II. QUESTIONS PRESENTED

1. May a court, consistent with the First Amendment, impose a compliance monitor and "governance expert" on a non-profit advocacy group over its objection, at the behest of a state official who has repeatedly announced that she would use her state power to destroy the group in retaliation for its First Amendment-protected speech?

The court below answered this question in the affirmative.

2. Do the EPTL, N-PCL, the Executive Law, or the inherent judicial powers authorize the court to impose a compliance monitor or "governance expert" upon a non-profit over its objection, where the relevant statutes provide for specific remedies but do not mention a compliance monitor or "governance expert"?

The court below answered this question in the affirmative.

III. STATEMENT OF RELEVANT FACTS

A. The NRA Is a Member-Run Second Amendment Advocacy Group.

The National Rifle Association (NRA) is a non-profit committed to providing

[20] *See* Section IV.C *infra*.

marksmanship and gun safety education for the military, law enforcement and civilians.[21] It also the foremost defender of the right of all law-abiding individuals to purchase, possess, and use firearms, as guaranteed by the Second Amendment to the U.S. Constitution.[22] It is a member-run organization. Each member of the NRA's 76-person, independent Board of Directors is elected directly by the NRA's members via a balloting process.[23] Many Board members are former elected representatives and are closely involved in the affairs of their communities.[24] Many are attorneys or grassroots activists who advocate directly for the rights of gunowners.[25]

The NRA Board of Directors annually elects several of the NRA's officers, including the President, two vice-presidents, Executive Vice President (i.e., the chief

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[21] R. at A-7.361

[22] *Id*.

[23] *See NRA Bylaws*, Article IV, Section 1, THE NATIONAL RIFLE ASSOCIATION, https://michellawyers.com/wp-content/uploads/2021/10/2021-10-18-Exh-1-ISO-NRAs-Memo-of-Law-in-Opp-to-Mtn-to-Intervene-by-Roscoe-B.-Marshall-Jr..pdf; *Annual Meeting of Members Event Invite*, THE NATIONAL RIFLE ASSOCIATION, https://www.nraam.org/events/2023-events/saturday-april-15/annual-meeting-of-members/ ("Lifetime and annual members with at least five years of consecutive membership . . . are strongly urged to participate in the business of our Association and to vote on issues presented during the Members' Meeting.").

[24] *See, e.g.,* NRA Reelects Charles Cotton as President; Wayne LaPierre as CEO/EVR at Indianapolis Board of Directors Meeting, THE NATIONAL RIFLE ASSOCIATION, April 15, 2023, https://home.nra.org/statements/nra-reelects-charles-cotton-as-president-wayne-lapierre-as-ceoevp-at-indianapolis-board-of-directors-meeting/; Carolyn D. Meadows, *NRA Board Working For Members To Support Our Common Cause*, THE NATIONAL RIFLE ASSOCIATION, https://www.americas1stfreedom.org/content/president-s-column-nra-board-working-for-members-to-support-our-common-cause/.

[25] *See, e.g., Joel Friedman*, NRASTRONG.COM, https://nrastrong.org/joel-friedman; *Sandy Froman: Meet a Past NRA President*, THE NATIONAL RIFLE ASSOCIATION, https://www.nrawlf.org/our-members/sandy-froman/.

executive officer), Secretary and Treasurer.[26] The results of such elections are recorded in the meeting minutes and published for the benefit of NRA members.[27] In addition, NRA members are the primary source of financing for the NRA.[28] The NRA (or its affiliates) solicit membership dues, donations, and political contributions from its approximately 5 million members.[29]

B. Cuomo and Other New York Officials Embark on a Campaign to "#BankruptttheNRA" Due to Dislike for Its Advocacy.

Beginning in 2017, high-ranking New York officials have pursued a concerted campaign to punish the NRA for its Second Amendment advocacy.[30] Devised in 2017, this plan called for the NYAG to conduct an "investigation" of the NRA to "find" reasons to commence legal actions against the NRA.[31] 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.[32] Unfortunately, Schneiderman later resigned.[33]

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[26] *NRA Bylaws*, Article V, Section 1, THE NATIONAL RIFLE ASSOCIATION, https://michellawyers.com/wp-content/uploads/2021/10/2021-10-18-Exh-1-ISO-NRAs-Memo-of-Law-in-Opp-to-Mtn-to-Intervene-by-Roscoe-B.-Marshall-Jr..pdf.
[27] *Id.* at Article VII, Section 2.
[28] Holmes Lybrand, *Fact-checking Gillibrand's claim NRA 'is largely funded' by gun makers*, WRAL NEWS, April 11, 2019, https://www.wral.com/fact-checking-gillibrand-claims-nra-is-largely-funded-by-gun-makers/18319901/.
[29] R. at A-7.362.
[30] *Id*. at A-7.363.
[31] *Id*.
[32] *Id*.
[33] *Id*.

Then-Governor Andrew Cuomo played a key initial role in formulating the scheme. For over twenty years, he has wished to shut the NRA down.[34] He declared that gun rights advocacy groups "have no place in the state of New York.[35] At Cuomo's direction, the then-Superintendent of DFS, Maria Vullo, threatened institutions she regulated with costly investigations, increased regulatory scrutiny, and penalties unless they discontinued their business relationships with NRA.[36]

On April 19, 2018, Vullo followed her backchannel threats with official regulatory guidance from DFS to the chief executive officers of all banks and insurance companies doing business in New York.[37] In them, DFS warned regulated institutions of the "reputational risk" of further "dealings with the NRA" in light of the "social backlash" against it for its Second Amendment advocacy.[38] Then, in the first week of May 2018, DFS announced multi-million-dollar fines against two insurance firms that dared to do business with NRA. Those insurers agreed to cease underwriting, managing, or selling affinity insurance programs for the NRA in

[34] *Id.* at A-7.365.
[35] Seth Lipsky, *Andrew Cuomo Is Now At War With the Bill of Rights*, THE NEW YORK POST, August 8, 2018, https://nypost.com/2018/08/08/andrew-cuomo-is-now-at-war-with-the-bill-of-rights/.
[36] R. at A-7.365; *Guidance on Risk Management Relating to the NRA*, NEW YORK DEPARTMENT OF FINANCIAL SERVICES, Apr. 19, 2018, https://www.dfs.ny.gov/system/files/documents/2020/03/il20180419_rm_nra_gun_manufacturers_banking.pdf.
[37] *Id*.
[38] *Id*.

perpetuity, regardless of the legality of the program. Shortly thereafter, a third firm announced on May 9, 2018, that it had directed its underwriters to terminate all insurance programs associated with the NRA and not to provide any insurance to the NRA in the future due to DFS's investigations into the NRA and its business partners.[39]

Privately, these companies stated that the decision to sever ties with the NRA arose from fear of retaliation from New York regulators. The NRA's longtime insurance broker, Lockton, worried about "losing [its] license" to do business in New York,[40] and internal documents obtained from Lloyd's reveal that Vullo's investigation had transformed the "gun issue" into a compliance matter in New York.[41] The NRA has encountered similar fears from providers of corporate insurance and even banks contacted for basic depository services.[42] Before Vullo's threats, these same banks engaged readily with the NRA.[43]

The Cuomo/Vullo intimidation campaign had devastating consequences for the NRA.[44] The NRA's insurance partners dropped the NRA under pressure. And

[39] Reuters Staff, *Lloyd's Underwriters Told to Stop Insurance Linked to NRA*, REUTERS, May 9, 2018, https://www.reuters.com/article/us-lloyds-of-london-nra/lloyds-underwriters-told-to-stop-insurance-linked-to-nra-idUSKBN1IA1T5.
[40] National Rifle Association of America's Second Amended Complaint and Jury Demand, at 18, *NRA v. Vullo*, No. 18-CV-00566-TJM-CFH, ECF No. 203 (N.D.N.Y June 2, 2020).
[41] *Id.* at 34.
[42] See generally *id*.
[43] *Id*.
[44] *Id.* at 33.

others in the industry confided that they could not "risk" the ire of DFS and therefore could not do business with the NRA.[45]

For his part, Cuomo 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." [46] He boasted that "NY is forcing the NRA into financial crisis. It's time to put the gun lobby out of business. #BankrupttheNRA."[47]

C. The NYAG Joins Cuomo's Campaign, Promising to Use State Power to "Take Down the NRA" in Retaliation for Advocacy.

As a candidate for NYAG in 2018, James vowed to take adverse action against the NRA before she had any reason to do so. She called the NRA an "organ of deadly propaganda masquerading as a charity" and vowed to wield the NYAG's nonprofit-supervisory power against the NRA and its financial supporters.[48] James promised that, if elected, her "top issue" would be "going after the NRA because it is a criminal enterprise."[49] She vowed to follow Cuomo's financial-blacklisting campaign by

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[45] *Id.* at 35–36.

[46] Andrew Cuomo (@andrewcuomo), Twitter (Aug. 3, 2018, 2:57 PM), https://twitter.com/andrewcuomo/status/1025455632755908608.

[47] Andrew Cuomo (@andrewcuomo), Twitter (Aug. 4, 2018, 9:47 AM), https://mobile.twitter.com/andrewcuomo/status/1025755155688513538.

[48] See Jon Campbell, *NY AG Letitia James Called the NRA a 'Terrorist Organization.' Will It Hurt Her Case?*, USA TODAY, Aug. 19, 2020, https://www.usatoday.com/story/news/politics/2020/08/19/nra-lawsuit-nyag-letitia-james-past-comments/5606437002/.

[49] R. A-7.367.

"put[ting] pressure upon the banks that finance the NRA" to choke off support for its Second Amendment speech.[50]

In early 2018, James condemned a fundraising event benefitting the NRA Foundation[51] and celebrated banks that cut financial ties to firearms companies.[52] James used social media to assail "NRA-backed politicians" and promoted her willingness to "take on the NRA, gun manufacturers, retailers & banks that fund these weapons of death [firearms]."[53]

Beginning in the summer of 2018, James made a series of highly publicized statements vowing, if elected, to investigate the NRA.[54] She called the NRA a "organ of deadly propaganda," a "criminal enterprise" and a "terrorist organization."[55] She

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[50] *Id*.

[51] Stephen Rex Brown, *Coney Island Restaurant Ripped by State and City Pols for Hosting NRA Fund-raiser*, NEW YORK DAILY NEWS, Feb. 26, 2018, https://www.nydailynews.com/new-york/brooklyn/coney-island-restaurant-blasted-hosting-nra-fund-raiser-article-1.3843345.

[52]NYC Public Advocate (@NYCPAJames), Twitter (Mar. 6, 2018), https://twitter.com/NYCPAJames/status/971043727522258944?s=20.

[53] NYC Public Advocate (@NYCPAJames), Twitter (May 18, 2018, 12:33 PM), https://twitter.com/NYCPAJames/status/997530554827501568; Tish James (@TishJames), Twitter (Jul. 12, 2018, 10:27 AM); https://twitter.com/TishJames/status/1017430252971347968.

[54] Jillian Jorgensen, *Letitia James Says She'd Investigate NRA's Not-For-Profit Status if Elected Attorney General*, NEW YORK DAILY NEWS, July 12, 2018, https://www.nydailynews.com/news/politics/ny-pol-tish-james-nra-20180712-story.html.

[55] *See* Tish James for Attorney General, *Tish James Announces Attorney General Platform to Protect New Yorkers from Gun Violence*, July 12, 2018, https://web.archive.org/web/20230420210623/https://www.tishjames2018.com/press-releases/2018/7/12/taking-on-the-scourge-of-gun-violence-and-keeping-new-yorkers-safe/; Our Time Press Admin, *Attorney General Candidate, Public Advocate Letitia James*, OUR TIME PRESS, Sept. 6, 2018, https://web.archive.org/web/20180909170122/https:/ourtimepress.com/attorney-general-candidate-public-advocate-letitia-james; #TeamEBONY, *Letitia "Tish" James on Becoming New York's Next Attorney General*, EBONY, Oct. 31, 2018, https://www.ebony.com/letitia-tish-james-on-becoming-new-yorks-next-attorney-general/.

declared that its speech was "poisonous." She vowed that, if elected, she would use her "power as attorney general" to "take down the NRA."[56]

Specifically, James vowed to leverage her "power as an attorney general to regulate charities" to instigate a fishing expedition into the NRA's "legitimacy . . . to see whether or not they have in fact complied with the not-for-profit law in the State of New York."[57] As a candidate for office, James had no factual evidence of misconduct sufficient to warrant dissolution. And she had no evidence that the NRA was a "criminal enterprise."

Upon being elected, James fulfilled her campaign promise and launched an investigation into the NRA.[58] Despite meager results, the NYAG initiated this lawsuit seeking, *inter alia*, to dissolve the NRA and seize its assets. On August 6, 2020, the NYAG held a press conference where she announced the filing of her dissolution lawsuit. At the press conference, the NYAG repeatedly misstated the facts of the matter, struggled to identify who at the NRA she believed engaged in misconduct, and was unable to justify dissolving an organization lawfully organized and pursuing programs which served the interests of its millions of members and supporters.[59] So obviously political in its motivation was the NYAG's lawsuit that

[56] *Id.*
[57] *Id*.
[58] R. A-7.188.
[59] R. at A-7.379, n. 67.

it caused an immediate outcry across the political spectrum as an abusive and unconstitutional action.[60]

The NYAG's announcement was accompanied by a media advisory and a subsequent public relations campaign, generating extensive negative media attention for the NRA.[61] The NYAG has continued to emphasize her pursuit of the NRA as a core aspect of her political identity. In her "2020 Year in Review," she proudly highlighted her campaign against the NRA, using colorful pictures, TV screen shots, and front-page images from national newspapers to showcase her actions against the organization.[62] And on October 29, 2021, James announced her campaign for

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[60] *Id.* at A-7.190, nn. 8–10; *see also id*. at R. A-7.380, n. 70.

[61] *See* Mark Maremont, *New York Attorney General Seeks to Dissolve National Rifle Association*, WALL STREET JOURNAL, Aug. 7, 2020, https://www.wsj.com/articles/new-york-attorney-general-seeks-to-dissolve-the-national-rifle-association-11596728487; Danny Hakim, *New York Attorney General Sues N.R.A. and Seeks Its Closure*, THE NEW YORK TIMES, Aug. 6, 2020, https://www.nytimes.com/2020/08/06/us/ny-nra-lawsuit-letitia-james.html; Carol D. Leonnig and Tom Hamburger, *New York Attorney General Seeks to Dissolve NRA*, THE WASHINGTON POST, Aug. 6, 2020, https://www.washingtonpost.com/politics/nra-lapierre-ny-attorney-general/2020/08/06/8e389794-d794-11ea-930e-d88518c57dcc_story.html; Dennis Slattery and Larry McShane, *NRA's Non-Profit Status In The Cross-Hairs of State Attorney General James Amid Allegations of Multi-Million Dollar Fraud*, NEW YORK DAILY NEWS, Aug. 6, 2020, https://www.nydailynews.com/news/politics/ny-tish-james-nra-announcement-lawsuit-20200806-ysdpxhgkufeznhgozyfgz6degu-story.html; Sonia Moghe, *New York Attorney General Files Lawsuit to Dissolve the National Rifle Association*, CNN, Aug. 6, 2020, https://www.cnn.com/2020/08/06/politics/ny-ag-announcement/index.html; Steve Benen, *NY Attorney General Sues to 'Dissolve' the NRA 'In Its Entirety,'* MSNBC, Aug. 6, 2020, https://www.msnbc.com/rachel-maddow-show/maddowblog/ny-attorney-general-sues-dissolve-nra-its-entirety-n1236048.

[62] *Attorney General James Releases Annual Report Highlighting Key Actions Undertaken in 2020*, OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL, December 31, 2020, https://ag.ny.gov/press-release/2020/attorney-general-james-releases-annual-report-highlighting-key-actions-undertaken.

governor with a launch video that touted her work to "eliminate the NRA."[63]

As the NYAG hoped, the prolonged legal battle and ongoing negative publicity campaign she orchestrated have harmed the NRA's reputation, donor relationships, and financial stability.

D. After Her Initial Attempt to Dissolve the NRA Fails, the NYAG Substitutes a Claim for a "Compliance Monitor with responsibility to report to the Attorney General" and an "Independent Governance Expert."

The NRA was able to instill a measure of confidence in its donors and supporters when the NYAG's dissolution claims were struck down in March 2022.[64] However, the NYAG filed an amended complaint in May 2022, seeking the appointment of a monitor to oversee the NRA's management of its assets.[65]

The NYAG's invective against the NRA continued as campaigned for her 2022 reelection. At that time, she again used social media to admonish the NRA for trying to "evade the law and avoid the consequences of their actions."[66]

If the Court were to impose a compliance monitor on the NRA, it would impair its ability to effectively advocate for its mission. The appointment of a

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[63] Amy Wang, Tyler Pager, and Josh Dawsey, *New York Attorney General Letitia James Announces Run for Governor*, THE WASHINGTON POST, October 29, 2021, https://www.washingtonpost.com/politics/2021/10/29/new-york-attorney-general-letitia-james-announces-run-governor/.
[64] *See* Decision and Order on Motion (NYSCEF 611).
[65] R. at A-7.1.
[66] *See* NY AG James (@NewYorkStateAG), Twitter (Sep. 30, 2022, 11:33 AM), https://twitter.com/NewYorkStateAG/status/1575886453728776192?s=20.

monitor would be perceived by its members, donors, and supporters as the NRA "losing control" of its business, mission, and public advocacy. This would cast a shadow over the NRA and destroy the goodwill associated with the NRA brand.

Further, the NRA frequently litigates Second Amendment suits against the NYAG to protect the constitutional rights of New York gun owners.[67] Imposing a compliance monitor raises the specter of the NRA's litigation strategy and expenditures—including many suits against the NYAG—being overseen by an official who reports directly to the NYAG.[68] That prospect raises grave First Amendment concerns.[69]

E. The NYAG Has a History of Using Overreaching Investigations and Selective Disclosure of Confidential Information to Intimidate Her Political Opposition.

The appointment of a monitor to oversee administration of the assets of the

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[67] *NRA-ILA Spring 2023 Litigation Newsletter*, NRA-ILA, April 7, 2023, https://www.nraila.org/articles/20230407/nra-ila-spring-2023-litigation-newsletter (noting pending NRA litigation against New York); *New NRA-ILA Backed Lawsuit Challenges New York's Unconstitutional Carry Restrictions*, NRA-ILA, Aug. 31, 2022, https://www.nraila.org/articles/20220831/new-nra-ila-backed-lawsuit-challenges-new-yorks-unconstitutional-carry-restrictions.

[68] To take just one example, the landmark *New York State Rifle & Pistol Association v. Bruen* case successfully challenging New York's gun laws on Second Amendment grounds was brought by NRA's New York state affiliate and supported by the NRA's Institute for Legislative Action. In the suit, New York was defended by the NYAG. 142 S. Ct. 2111 (2022); *see also NRA Wins Supreme Court Case, NYSRPA v. Bruen*, NRA-ILA, June 23, 2022, https://www.nraila.org/articles/20220623/nra-wins-supreme-court-case-nysrpa-v-bruen.

[69] Cf. *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 438–39 (1963) (rebuking Virginia's attempt to curtail the NAACP's legal advocacy by purporting to enforce attorney ethics rules).

NRA would raise questions in members' and donors' minds whether their identity and support for the NRA would remain confidential or whether, to the contrary, the NRA's members' and donors' identity would become known to a governmental agency or some portion of the public—or both. That is particularly so because the monitor would have "with responsibility to report to" the NYAG, who has vowed to destroy the NRA and pursue its donors and supporters like members of Al-Qaeda or the Mafia.[70] And it is reinforced by the NYAG's well-documented history of strategically seeking to obtain sensitive, confidential information regarding right-wing groups and websites she ideologically opposes—including donor lists—and then disclosing such information to the public.

Besides California, the NYAG was the only state attorney general to require disclosure of donor information from all non-profits under her jurisdiction. The NYAG informally stopped collecting Schedule Bs after the Supreme Court decision in *Americans for Prosperity*, and formally amended its regulations effective March 16, 2022.[71] The NYAG no longer requires the names of donors. But it still asks for donation amounts and the donor's state location on Schedule Bs or gross amounts from New York donors on the NYAG's annual filing form.

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[70] R. at A-7.362.

[71] *Regulations Amending Requirement to File Schedule B to IRS Form 990 Promulgated CharitiesNYS.com*, NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL, https://web.archive.org/web/20221020180317/https://www.charitiesnys.com/schedulebnotice.html.

However, the NYAG has never adopted effective policies or regulations protecting the confidentiality of sensitive donor and employee information from being leaked or disclosed. Nor does it properly train its employees to keep information confidential and avoid leaking. Further, it refuses to destroy Schedule Bs that it does have in its possession from its prior policy.[72] And it does not maintain adequate security over Schedule Bs that are in its possession.[73]

Despite repeated requests, the NYAG has refused to disclose records reflecting its retention and destruction policies for Schedule Bs.[74] It also has refused to provide any information regarding how and where Schedule Bs are maintained. Nor has it disclosed who has access to those Schedule Bs still kept by it. Despite multiple requests, the NYAG has failed to inform the organizations subject to its oversight about the manner and location in which tax forms and other confidential materials collected by the NYAG are stored and maintained.[75]

In 2022, the NYAG disclosed the donor information of presidential candidate Nikki Haley's non-profit to *Politico* magazine.[76] Haley is a Republican whom James

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[72] *See* Verified Complaint, *Empire Center for Public Policy v. Letitia James*, Index No. 904322-23 (Sup. Ct. Albany County, May 16, 2023).
[73] *Id*.
[74] *Id*.
[75] *Id*. Earlier, another non-profit filed suit against the NYAG challenging her egregiously inadequate document retention policies. *See* Complaint, *Liberty Justice Center v. James*, 1:21-cv-06024 (S.D.N.Y. July 14, 2021).
[76] *See* Alex Isenstadt, *Document Reveals Identity of Donors Who Secretly Funded Nikki Haley's Political Nonprofit*, POLITICO, Aug. 26, 2022,

ideologically opposes. The leaked documents bore a stamp from the office of the NYAG, leaving no doubt as to who was responsible for their disclosure. The NYAG has been unable to answer questions regarding how the confidential list of donors was disclosed.[77] She claimed that an internal investigation determined that a switching of software systems caused the security break, leading to her leaking Haley's donor list.[78] James claimed that the confidential records of many nonprofits were exposed—not just Haley's. But she was unable to explain why those of Haley's organization seemed to be the only ones disclosed**.**[79]

The NYAG's disclosure of Haley's confidential donor list is part of a larger pattern of the NYAG's pattern of weaponizing her office against her political opponents. Along with the three other Democratic Party state attorneys general, the NYAG has launched an investigation into the Republican Party fundraising platform

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https://www.politico.com/news/2022/08/26/donors-secretly-funded-nikki-haleys-nonprofit-00053963 (noting that the unredacted tax filing "bears a stamp from the charity office of the New York state attorney general" and that "donors contribute to nonprofit groups with the understanding that their names will be kept secret."); Carl Campanile, *Nikki Haley Accuses NY AG Letitia James of Leaking Donor List, Breaking Law*, THE NEW YORK POST, August 30, 2022, https://nypost.com/2022/08/30/nikki-haley-accuses-ny-ag-letitia-james-of-leaking-donor-list/; Houston Keene, *New York Republicans Demand Garland Investigate Empire State AG Letitia James Over Nikki Haley Group Tax Leak*, FOX NEWS, October 13, 2022, https://www.foxnews.com/politics/new-york-republicans-demand-garland-investigate-empire-state-ag-letitia-james-nikki-haley-group-tax-leak.

[77] Newsday Editorial Board, *Letitia A. James for New York's attorney general*, NEWSDAY, October 22, 2022, https://www.newsday.com/opinion/endorsements/letitia-a-james-nys-attorney-general-long-island-election-2022-jfznzuuv.

[78] *Id*.

[79] *Id*.

WinRed. In that capacity, the NYAG issued broad subpoenas and civil investigative demands to WinRed, seeking highly confidential donor information. A federal appellate judge noted that the subpoenas "request[] an extraordinary amount of sensitive information from a political organization, some of which has a tenuous relationship, at best, with the AG's investigation."[80] The judge stated, "I am concerned about the breadth of the" subpoenas.[81] Those subpoenas sought, *inter alia*, "the identities of all political committees, parties, and candidates (and any other clients) for whom WinRed has used pre-checked recurring or additional donation boxes" [82] This is extremely sensitive donor information that has only a tenuous relationship with any legitimate aims of the investigation.

That is not all. In May 2022, the NYAG launched a highly publicized investigation targeting what she characterized as "dangerous and hateful platforms"—despite the fact that federal law shields such platforms from liability for user content.[83] The NYAG claimed that her investigation sought to "to shine a spotlight on this alarming behavior"—that is, serving as a forum for user speech. As part of this investigation, the NYAG issued an investigative subpoena for the

[80] *WinRed, Inc. v. Ellison*, 59 F.4th 934, 947 (8th Cir. 2023) (Shepherd, J. concurring).
[81] *Id*.
[82] *Id*.
[83] Bobby Allyn, *New York Attorney General Launches Probe of Twitch and Discord after Buffalo Shooting*, NPR, May 18, 2022, https://www.npr.org/2022/05/18/1099827783/new-york-attorney-general-probe-twitch-discord-buffalo-shooting (noting that "online platforms are afforded sweeping protection from being held liable for what users post.").

ownership of the far-right website 4Chan. It then disclosed this highly sensitive ownership information, allegedly in response to a public records request from a *Wired* magazine journalist.[84] That sensitive corporate ownership information of a website was disclosed without any legitimate regulatory purpose shows that the NYAG's privacy regime is badly inadequate, and unable to protect confidential information from being disclosed to the general public.

Similarly, the NYAG issued an investigative subpoena to the far-right website VDARE seeking the identity of all employees, contractors, and board members—a demand that was outrageously overbroad. [85] Among other things, the NYAG sought to have VDARE disclose the names of its anonymous contributors and donors. This exposed VDARE's anonymous donor and employee information to the risk that James would leak it. At the very least, the mere existence of such a broad subpoena would inevitably chill deter donors, employees, and others from daring to affiliate with VDARE over the possibility that their information and knowledge of their affiliation would end up in the hands of the NYAG.

Further underscoring the inadequacy of New York's existing legal protections for confidential information, in 2021, then-Governor Cuomo's counsel

[84] Justin Ling, *How a Major Toy Company Kept 4chan Online*, WIRED, March 29, 2023, https://www.wired.com/story/4chan-good-smile/.
[85] *See* Verified Complaint, *VDARE Foundation v. James*, No 1:22-cv-01337-FJS-CFH (N.D.N.Y. Dec. 12, 2022) (ECF No. 1).

leaked confidential employment records of one of the women who accused him of sexual assault to the media. Cuomo's lawyer asserted that, under New York law, "it is within a government entity's discretion to share redacted employment records, including in instances when members of the media ask for such public information and when it is for the purpose of correcting inaccurate or misleading statements."[86]

In sum, the appointment of a compliance monitor would provide the monitor—and potentially also the NYAG, to whom the monitor would have an obligation to report—with a trove of sensitive and confidential information, which would expose the NRA's donors, members, and supporters to the risk of "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility" if their identities were revealed.[87] This risk is heightened due to the NYAG's history of improper maintenance of confidential information and leaking. Further, the mere risk that the identities of the NRA's donors, members, and supporters would fall into the hands of the NYAG—or a monitor "with responsibility to report to" her—would render them unwilling to continue to support the NRA and impose severe burdens on their First Amendment rights.

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[86] Maggie Haberman and Jesse McKinley, *How Cuomo's Team Tried to Tarnish One of His Accusers*, THE NEW YORK TIMES, March 16, 2001 (updated August 10, 2021), https://www.nytimes.com/2021/03/16/nyregion/cuomo-lindsey-boylan.html.

[87] *Alabama*, 357 U.S. at 462.

IV. ARGUMENT

A. THIS COURT MUST REVIEW THE LOWER COURT'S RULING *DE NOVO*.

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."[88] Statutory and constitutional questions present issues of law that are reviewed by the Appellate Division *de novo*.[89] An issue not raised at the trial level may be raised on appeal if it is legal in nature and does not rely on facts outside the record.[90] Furthermore, legislative facts, including materials in the public record, may be considered by the Appellate Division for the first time on appeal, even if they are not in the record.[91]

"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."[92] Thus, "when a case involves free expression, [the appellate court] must make an independent examination of the whole record so as to assure [itsef] that the judgment does not constitute a forbidden intrusion on the field of free

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[88] CPLR 5501.

[89] *Weingarten v. Bd. of Trustees of New York City Teachers' Ret. Sys.*, 98 N.Y.2d 575, 579–80 (2002); *People ex rel. DeMauro v. Gavin*, 92 N.Y.2d 963, 964 (1998); *S. H. v. Diocese of Brooklyn*, 205 A.D.3d 180, 185 (2d Dept 2022) ("The interpretation of this statutory language presents questions of law for this Court to resolve *de novo*");

[90] *See Seldon v. Allstate Ins. Co.*, 107 A.D.3d 424, 971 N.Y.S.2d 438 (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).

[91] *Affronti v. Crosson*, 95 N.Y.2d 713, 720 (2001).

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

expression."[93]

When reviewing an order denying dismissal under CPLR 3211(a)(7), the court must determine "whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action."[94] The claim against which dismissal is sought survives only if it states a "cognizable legal theory."[95] A pleading that insufficiently alleges its factual and legal bases will not survive.[96]

B. IMPOSING AN "INDEPENDENT COMPLIANCE MONITOR WITH RESPONSIBILITY TO REPORT TO THE ATTORNEY GENERAL" AND AN "INDEPENDENT GOVERNANCE EXPERT" ON THE NRA WOULD VIOLATE THE FIRST AMENDMENT.

1. The NYAG's Requests to Impose Such Officials Are Subject to "Exacting Scrutiny" Due to Their Grave Implications for the NRA's Ability to Advocate for Its Members.

Government action taken with the intent and effect of chilling protected speech is prohibited by the First Amendment.[97] This rule applies not only to legislation. It equally covers investigations, government-initiated lawsuits, and

[93] *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)).
[94] *Bokhour v. GTI Retail Holdings, Inc.*, 94 A.D.3d 682, 682 (2d Dept 2012) (quoting *Sokol v. Leader*, 74 A.D.3d 1180, 1180–81, 904 N.Y.S.2d 153 (2d Dept 2010).
[95] *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)).
[96] *Bokhour*, 94 AD3d at 682.
[97] See, e.g., *Laird v. Tatum*, 408 U.S. 1, 11 (1972); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Baggett v. Bullitt*, 377 U.S. 360 (1964).

regulatory actions that seek to retaliate against speakers for their advocacy.[98] "In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action."[99] Thus, "[t]he Bill of Rights is applicable to investigations as to all forms of governmental action."[100] New York courts similarly recognize that "[a] government investigation should not be allowed to trespass on the principle that 'debate on public issues should be uninhibited, robust, and wide-open."[101]

Thus, investigations, lawsuits, and regulatory actions that "inhibit protected freedoms of expression and association"[102] or "surreptitiously" target certain groups[103] are as pernicious as laws that directly prohibit speech. "Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible."[104] Indeed, indirect regimes may be more problematic because they "eliminate[] the safeguards" associated with direct

[98] *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 69–70 (1963); *Greenwich Citizens Comm., Inc. v. Ctys. of Warren & Washington Indus. Dev. Agency*, 77 F.3d 26, 31 (2d Cir. 1996); *United States v. P.H.E., Inc.*, 965 F.2d 848, 849 (10th Cir. 1992).
[99] *Alabama*, 357 U.S. at 461.
[100] *Watkins v. United States*, 354 U.S. 178, 187 (1957).
[101] *Evergreen Ass'n, Inc. v. Schneiderman*, 153 A.D.3d 87, 100 (2d Dept 2017).
[102] *Button*, 371 U.S. at 437–38; *Alabama*, 357 U.S. 449, 460–62 (1958).
[103] *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1596 (2022) (Alito, J., concurring).
[104] *Watkins v. United States*, 354 U.S. 178, 187 (1957).

regulation.[105] The government may not "use the agents and instrumentalities of law enforcement to curb speech protected by the First Amendment" via a "campaign of harassment and intimidation."[106]

One particularly potent way for the state to stop the advocacy of a civil rights organization is to force it to disclose the identities of its donors, members, supporters and employees. This bullying tactic was famously used by Alabama's Attorney General, John Patterson, as part of his war to shut down the NAACP in the 1950s. Patterson knew that disclosure of the names of NAACP supporters and employees would subject these individuals to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[107] That is exactly why he did it. Patterson thought he could indirectly use state power to do something he could not do directly—shut down the NAACP.

But the U.S. Supreme Court held that Patterson's attempt to destroy the NAACP by means of a public humiliation campaign violated the First Amendment. It noted that "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."[108] Further, it observed "the vital relationship between freedom to associate and privacy

[105] *Bantam Books, Inc*., 372 U.S. at 70.
[106] *United States v. P.H.E., Inc*., 965 F.2d 848, 856 (10th Cir. 1992).
[107] *Alabama*, 357 U.S. at 462.
[108] *Id.* at 460.

in one's associations."[109] Because NAACP members faced a risk of reprisals if their affiliation with the organization became known—and because Alabama had demonstrated no offsetting interest "sufficient to justify the deterrent effect" of compelled disclosure—Patterson's campaign to destroy the NAACP by subjecting its members, supporters and employees to boycotts, loss of employment and other reprisals violated the First Amendment.[110]

The U.S. Supreme Court reiterated its holding in *Alabama* in *Americans for Prosperity*, decided in 2021.[111] Like the NYAG, the California Attorney General's Office is responsible for "the supervision and regulation of charitable fundraising."[112] As part of his regulatory authority, the California Attorney General required non-profit entities to disclose to their Schedule B to their Internal Revenue Service Form 990, which included "the names and addresses of donors who have contributed more than $5,000 in a particular tax year (or, in some cases, who have given more than 2 percent of an organization's total contributions)."[113] Conservative non-profits sued to enjoin the requirement, alleging "that disclosure of their Schedule Bs would make their donors less likely to contribute and would subject

[109] *Id.* at 462.
[110] *Id.* at 463.
[111] 141 S. Ct. 2373, 2387–89 (2021).
[112] *Id.* at 2379.
[113] *Id.* at 2380.

them to the risk of reprisals."[114] The non-profits alleged that this requirement obligation "to disclose Schedule Bs to the Attorney General was unconstitutional on its face and as applied to them" under the First Amendment.[115]

The U.S. Supreme Court sustained both challenges. Applying "exacting scrutiny," it held that California's requirement that non-profits disclose the identity of their donors to the California Attorney General violated the First Amendment. The disclosure requirement violated the First Amendment facially because it burdened the associational rights of donors without a sufficient justification. And the disclosure requirement violated the First Amendment as applied to conservative non-profits that "had suffered from threats and harassment in the past," and whose donors, employees and contractors "were likely to face similar retaliation in the future if their affiliations became publicly known," including death threats and "harassing calls, intimidating and obscene emails, and even pornographic letters."

Americans for Prosperity reiterated that "compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as other forms of governmental action" and "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably

[114] *Id.*
[115] *Id.* at 2385.

enhanced by group association."[116] Specifically, a state Attorney General cannot attempt to obtain sensitive information about a disfavored advocacy group's donors, employees and supporters as part of "an effort to oust the organization from the State" by means of subjecting its supporters to "a risk of reprisals" when "their affiliation with the organization became known."[117] Notably, the Supreme Court found that "[d]onors and potential donors would be reasonably justified in a fear of disclosure" in light of previous failures by the California Attorney General to safeguard donor information.[118] The petitioners in *Americans for Prosperity* "introduced evidence that they and their supporters have been subjected to bomb threats, protests, stalking, and physical violence"[119]—much like the NRA and its supporters.[120]

Further, "exacting scrutiny" was triggered just by disclosure to the Attorney General—not even the general public. "Our cases have said that disclosure requirements can chill association even if there is no disclosure to the general public."[121] "Exacting scrutiny is triggered by state action which *may* have the effect

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[116] *Id.* at 2382 (cleaned up) (quoting *Alabama*, 357 U.S. at 460, 462).
[117] *Id.*
[118] *Id.* at 2381.
[119] *Id.* at 2388.
[120] R. at A-7.59; *see also* Complaint (Verified) for Injunctive Relief & Damages, *Hammer v. Sorensen et al.*, Index No. 4:18-CV-00329 (N. D. Fla. July 13, 2018) (describing "campaign of hate and vitriol" directed against NRA Board Member Marion Hammer).
[121] *Americans for Prosperity*, 141 S. Ct. at 2388 (cleaned up).

of curtailing the freedom to associate, and by the *possible* deterrent effect of disclosure."[122] "**While assurances of confidentiality may reduce the burden of disclosure to the State, they do not eliminate it**."[123] In sum, imposing on "**associational rights . . . . cannot be justified on the ground that the regime is narrowly tailored to investigating charitable wrongdoing**."[124]

The NYAG's attempt to retaliate against the NRA for its advocacy is on all fours with the Alabama Attorney General's attempt to cripple the NAACP by compelled disclosure of its employees and supporters and the California Attorney General's requirement that non-profits disclose confidential information. Just like in *Alabama*, the NYAG has announced her intent to take adverse action against the NRA because she dislikes its political advocacy. She has called the NRA "a terrorist organization" and a "criminal enterprise" and condemned its speech as "poisonous" and "deadly propaganda."[125] She vowed to use her "power as attorney general" to "take down the NRA."[126] She has said that she wishes to pursue its supporters like members of Al-Qaeda or the Mafia.[127] And just like in *Americans for Prosperity*, the NYAG's record of disclosing sensitive donor information shows that any disclosure

[122] *Id.* (cleaned up) (emphasis in original).
[123] *Id.* (emphasis added).
[124] *Id.* at 2389 (emphasis added).
[125] R. at A-7.362.
[126] *Id.*
[127] *Id*.

requirement to an "independent compliance monitor" with responsibility to report to her will chill donors, members, and others from associating with the NRA.

Indeed, the facts of this case are much more egregious than in *Americans for Prosperity*. Unlike *Americans for Prosperity*, the NYAG has never implemented measures to safeguard confidential information that she comes across. To this day, she refuses to destroy donor information that her office illegally collected, and she refuses to even disclose what if any measures she is taking to protect the confidentiality of such information.[128] Unlike in *Americans for Prosperity*, the NYAG has vowed to use the power of her office to destroy the NRA and hunt down its members like terrorists or criminals.[129] Unlike in *Americans for Prosperity*, James has a record of targeting conservative websites and speakers for retaliation with patently overbroad subpoenas seeking the identities of donors and employees.[130]

Thus, the appointment of a compliance monitor, as requested by the NYAG, would significantly curtail the NRA's ability to freely engage in First Amendment-protected speech. In particular, allowing the monitor access to the NRA's confidential information—or even creating doubt on this score—would seriously

[128] *See* Verified Complaint, *Empire Center for Public Policy v. Letitia James*, Index No. 904322-23 (Sup. Ct. Albany County, May 16, 2023).
[129] R. at A-7.362.
[130] *See* Section III.E, *supra*.

undermine the ability of NRA donors and its members to advocate for the constitutional rights they value.

2. The NYAG's Requests to Impose a Compliance Monitor and Governance Expert Are Subject to Strict Scrutiny Due to Their Infringement on the Associational Rights of the NRA and Its Members.

But even beyond the harm of exposing the NRA's information to a compliance monitor, the appointment of a compliance monitor with the intent to exert control over the NRA's activities would undermine the organization's independence and autonomy. It would impose upon the NRA two high-ranking officials—a compliance monitor and a governance expert—against its will. That violates the First Amendment-protected associational rights of the NRA and its members.

"Government actions that may unconstitutionally infringe upon" the First Amendment-protected freedom of association "can take a number of forms," including when the government seeks "to interfere with the internal organization or affairs of" an advocacy group.[131] "There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire."[132] "Forcing a group to accept certain members may impair the ability of the group to express those views, and only those

[131] *Roberts*, 468 U.S. at, 623.
[132] *Id*.

views, that it intends to express."[133] That is, "[f]reedom of association therefore plainly presupposes a freedom not to associate."[134] "Freedom of expressive association vindicates the important structural role that expressive associations play in our civil society and discourse."[135] In sum, the NRA has a First Amendment right to be governed "only by employees who sincerely share its views."[136] Further, in cases of compelled association, courts "must . . . give deference to an association's view of what would impair its expression."[137]

In this case, the NYAG seeks to force the NRA to accept sweeping oversight over its internal affairs—its "governance" and "administration of charitable assets"—that it does not desire.[138] The NRA's 76-member Board of Directors is elected directly by its members.[139] It is comprised of dedicated Second Amendment advocates, including attorneys, former elected representatives, former members of military and law enforcement, and grassroots activists who believe strongly in the NRA's mission.[140] The Board of Directors, in turn, appoints and oversees the NRA's

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[133] *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).
[134] *Roberts*, 468 U.S. at 623.
[135] *Slattery*, 61 F.4th at 290–91 (cleaned up).
[136] *Id*. at 288.
[137] *Boy Scouts of Am.*, 530 U.S. at 653.
[138] R. at A-7.164.
[139] *NRA Bylaws*, Article III, Section 6(e), THE NATIONAL RIFLE ASSOCIATION, https://michellawyers.com/wp-content/uploads/2021/10/2021-10-18-Exh-1-ISO-NRAs-Memo-of-Law-in-Opp-to-Mtn-to-Intervene-by-Roscoe-B.-Marshall-Jr..pdf.
[140] *See, e.g., Joel Friedman*, NRASTRONG.COM, https://nrastrong.org/joel-friedman; *Sandy Froman: Meet a Past NRA President*, THE NATIONAL RIFLE ASSOCIATION, https://www.nrawlf.org/our-members/sandy-froman/.

officers.[141] The NRA is financed primarily by member dues.[142]

Imposition of an "independent compliance monitor with responsibility to report to the Attorney General" and "ensure the proper administration of [its] charitable assets," along with a "governance expert," would rob the NRA of its ability to conduct its advocacy without intrusive oversight from the NYAG.[143] It would also rob the NRA's members of their ability to control the affairs of the NRA.

It would be all too easy for the NYAG's policy preferences to trickle down through a monitor's oversight of the NRA's "administration of its charitable assets." For example, if the NRA engaged in advocacy that the NYAG found distasteful, it could ensure that advocacy ended by complaining to the compliance monitor, an official who would report to the NYAG. Such complaints could very easily be couched in terms of the effect of the advocacy's effect on the NRA's budget and finances. Put simply, the NRA and its members have a First Amendment right to avoid forced association with third-party entities—a "compliance monitor" and "governance expert"—that the NYAG seeks to impose upon it.

This risk is especially pronounced given that the NRA frequently litigates

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[141] *NRA Bylaws*, Article IV, Section 2, THE NATIONAL RIFLE ASSOCIATION, https://www.creditslips.org/files/nra-bylaws.compressed.pdf.
[142] Holmes Lybrand, *Fact-checking Gillibrand's claim NRA 'is largely funded' by gun makers*, WRAL NEWS, April 11, 2019, https://www.wral.com/fact-checking-gillibrand-claims-nra-is-largely-funded-by-gun-makers/18319901/.
[143] R. at A-7.164.

Second Amendment and other gun rights suits against the NYAG.[144] Allowing the imposition of a compliance monitor and governance expert creates an intolerable risk that its litigation strategy and litigation expenditures will be subject to oversight by its opponent in court—the NYAG. That is in addition to the grave confidentiality concerns created by having the NRA's day-to-day operations overseen by a New York state official with responsibility to report to the NYAG, when the NRA's day-to-day operations routinely involve litigation against New York and the NYAG.

Further underscoring these concerns, the NYAG has declared that the NRA is a "terrorist organization" and a "criminal enterprise," and characterized its speech as "deadly propaganda.[145] Further, the NYAG's request for the appointment of a compliance monitor "with responsibility to report to the Attorney General" comes after her unlawful—and plainly punitive—attempt to dissolve the NRA altogether failed.[146]

Thus, the NYAG's requests for a compliance monitor and governance expert violates the First Amendment. The NRA "engages in expressive activity that could

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[144] *NRA-ILA Spring 2023 Litigation Newsletter*, NRA-ILA, April 7, 2023, https://www.nraila.org/articles/20230407/nra-ila-spring-2023-litigation-newsletter (noting pending NRA litigation against New York); *New NRA-ILA Backed Lawsuit Challenges New York's Unconstitutional Carry Restrictions*, NRA-ILA, Aug. 31, 2022, https://www.nraila.org/articles/20220831/new-nra-ila-backed-lawsuit-challenges-new-yorks-unconstitutional-carry-restrictions.

[145] R. at A-7.362.

[146] *Id*. at A-7.164.

be impaired" by the forcible imposition of such officials upon its day-to-day governance.[147] The imposition of a compliance monitor and governance expert would "significantly burden" the NRA's "right to freedom of expressive association" by raising the specter of its day-to-day governance being overseen by an entity, the NYAG, which openly desires its destruction and which has a record of poor security, disclosure of highly confidential and sensitive donor information, and overreaching subpoenas targeted against her ideological adversaries.

The NRA has a First Amendment right to be governed "only by employees who sincerely share its views."[148] Forcing it to be overseen in its administration of assets and governance by an official "with responsibility to report to the Attorney General and the Court,"[149] and not merely the NRA's members, triggers strict scrutiny under the First Amendment.

3. The NYAG's History of Poor Security and Professed Desire to Destroy the NRA Mean that Imposition of a Compliance Monitor and Governance Expert Raise Grave Privacy Concerns That Trigger "Exacting Scrutiny."

The NYAG's inability to protect the secrecy of confidential information it receives is a matter of public record.[150] It is a pervasive and substantial issue—so much so that even the U.S. Securities and Exchange Commission bristled at the

[147] *Slattery*, 61 F.4th at 287.
[148] *Id*. at 288.
[149] R. at A-7.164.
[150] *See* Section III.E *supra*.

possibility of sharing confidential information with the NYAG even where it shared the same enforcement goals.[151]

There is thus a strong analogy between the NYAG's request for compliance monitor "with responsibility to report to the Attorney General" and the regulatory regime struck down in *Americans for Prosperity*. In *Americans for Prosperity*, the Supreme Court found California's donor disclosure program unconstitutional in the light of its chilling effect on the First Amendment rights of nonprofit organizations and their members.[152] The Supreme Court understood that disclosure programs can chill free speech "even if there is no disclosure to the general public."[153] It noted the "constant and heavy pressure" donors may face "simply by disclosing their associational ties" to a given organization—pressure that only mounts when the organization in question faces regular attacks from a vast swath of individuals and organizations.[154] In striking down California's donor disclosure requirement, the Court took special note of the California Attorney General's demonstrated inability to maintain the privacy of confidential donor information.[155]

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[151] United States Securities and Exchange Commission, Office of Inspector General, Investigation of Circumstances Surrounding the SEC's Proposed Settlements with Bank of America, Including a Review of the Court's Rejection of the SEC's First Proposed Settlement and an Analysis of the Impact of Bank of America's Status as a TARP Recipient (2010), at 86.
[152] 141 S. Ct. at 2389.
[153] *Id.* at 2388 (quoting *Shelton v. Tucker*, 364 U.S. 479, 486 (1960)).
[154] *Id.* (internal quotation marks omitted).
[155] *Id.* at 2388.

As in *Americans for Prosperity*, the NYAG's "promise of confidentiality rings hollow," and "donors and potential donors would be reasonably justified in a fear of disclosure."[156] In just the past few years, the NYAG has:

1. Had confidential Schedule Bs, containing sensitive donor information of Nikki Haley's political non-profit that they expected to be kept confidential, leaked from its offices due to an alleged security breach that the NYAG has not been able to adequately explain;[157]

2. Refused to destroy the reams of sensitive donor information she has on file via bulk collection of Schedule Bs, despite the unlawfulness of her past practice under *Americans for Prosperity*;[158]

3. Refused to even disclose what security precautions her office uses in protecting donor information and other confidential documents that her office comes across in the course of investigations and litigation;[159]

4. Launched an investigation into social media platforms for hosting user content, despite knowing that those platforms were engaged in entirely lawful behavior;[160]

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[156] *Id*.
[157] *See* Alex Isenstadt, *Document Reveals Identity of Donors Who Secretly Funded Nikki Haley's Political Nonprofit*, POLITICO, Aug. 26, 2022, https://www.politico.com/news/2022/08/26/donors-secretly-funded-nikki-haleys-nonprofit-00053963; Carl Campanile, *Nikki Haley Accuses NY AG Letitia James of Leaking Donor List, Breaking Law*, THE NEW YORK POST, August 30, 2022, https://nypost.com/2022/08/30/nikki-haley-accuses-ny-ag-letitia-james-of-leaking-donor-list/; Houston Keene, *New York Republicans Demand Garland Investigate Empire State AG Letitia James Over Nikki Haley Group Tax Leak*, FOX NEWS, October 13, 2022, https://www.foxnews.com/politics/new-york-republicans-demand-garland-investigate-empire-state-ag-letitia-james-nikki-haley-group-tax-leak; Newsday Editorial Board, *Letitia A. James for New York's attorney general*, NEWSDAY, October 22, 2022, https://www.newsday.com/opinion/endorsements/letitia-a-james-nys-attorney-general-long-island-election-2022-jfznzuuv.
[158] *See* Verified Complaint, *Empire Center for Public Policy v. Letitia James*, Index No. 904322-23 (Sup. Ct. Albany County, May 16, 2023).
[159] *Id*.
[160] Bobby Allyn, *New York Attorney General Launches Probe of Twitch and Discord after Buffalo Shooting*, NPR, May 18, 2022, https://www.npr.org/2022/05/18/1099827783/new-york-attorney-

5. Disclosed extremely sensitive ownership information regarding a controversial online platform which was targeted for investigation by James despite knowing that it could not be held liable for user speech;[161]

6. Sought the identities of anonymous contributors, donors and employees of another controversial website for which she had no legitimate investigative need;[162] and

7. Sought to enforce extremely broad subpoenas on the main fundraising platform of her political opposition seeking "an extraordinary amount of sensitive information from a political organization, some of which has a tenuous relationship, at best, with the AG's investigation"[163]

Telling, the NYAG specifies no safeguards on the monitor's access to or handling of information, nor does she specify any such safeguards for herself.

In this case, the NRA's leadership and board members are routinely subjected to death threats.[164] Its CEO and Executive Vice President, Wayne LaPierre, requires around-the-clock security because of the high risk of violence and harassment. Its Board Members are routinely subjected to vile harassment.[165] And the NRA as an

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general-probe-twitch-discord-buffalo-shooting (noting that "online platforms are afforded sweeping protection from being held liable for what users post.").

[161] Justin Ling, *How a Major Toy Company Kept 4chan Online*, WIRED, March 29, 2023, https://www.wired.com/story/4chan-good-smile/.

[162] *See* Verified Complaint, *VDARE Foundation v. James*, No 1:22-cv-01337-FJS-CFH (N.D.N.Y. Dec. 12, 2022) (ECF No. 1).

[163] *WinRed, Inc. v. Ellison*, 59 F.4th 934, 947 (8th Cir. 2023) (Shepherd, J. concurring).

[164] R. at A-7.59; *see also* Complaint (Verified) for Injunctive Relief & Damages, *Hammer v. Sorensen et al.*, Index No. 4:18-CV-00329 (N. D. Fla. July 13, 2018) (describing "campaign of hate and vitriol" directed against NRA Board Member Marion Hammer).

[165] *Id*.

entity is often faced with boycott efforts.[166] If the identities of the NRA's donors or other supporters became known, they would face "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[167]

In sum, given the NYAG's record of poor security, the appointment of a compliance monitor "with responsibility to report to the Attorney General" and a "governance expert" would create an intolerably high risk that information regarding the NRA's donors, members, and supporters, along with other sensitive information, would be released to the general public. The perception of such a risk is especially acute due to the NYAG's repeated expressions of deep hostility to the NRA and her professed desire to destroy it. The NYAG's requests for a "compliance monitor" with wide-ranging oversight powers and responsibility to report to the NYAG, along with a "governance expert," present grave privacy concerns that are "real and pervasive."[168] As in *Americans for Prosperity*, the mere *threat* of the NRA's information being disclosed is enough to trigger "exacting scrutiny" of the NYAG's demands for wide-ranging oversight of the NRA via a "compliance monitor" and

[166] National Rifle Association of America's Second Amended Complaint and Jury Demand, at p. 15, *NRA v. Vullo*, No. 18-CV-00566-TJM-CFH, ECF No. 203 (N.D.N.Y June 2, 2020), *available at* https://www.nralegalfacts.org/_files/ugd/91713c_df1d7f0ec8014b8fb35275605c6bcc8d.pdf.
[167] *Alabama*, 357 U.S. at 462.
[168] 141 S. Ct. at 2388–89.

"governance expert."[169]

4. The NYAG's Compliance Monitor Claim Cannot Survive Strict Scrutiny or Exacting Scrutiny

Under *Alabama* and *Americans for Prosperity*, the NYAG's request for "appointment of an independent compliance monitor with responsibility to report to the Attorney General" and "governance expert" must be subjected to "exacting scrutiny." Under *Slattery*, these requests are subject to "strict scrutiny" due to their effect on the NRA's association rights—particularly the right of its members to be governed by individuals who fully believe in its mission.[170] The NYAG cannot satisfy either standard, and she indeed has made no attempt to do so.

To survive either strict scrutiny or "exacting scrutiny," the NYAG must show that the imposition of a monitor and governance expert is "narrowly tailored to the interest it promotes."[171] "Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—because First Amendment freedoms need breathing space to survive."[172]

New York, like California, surely "has an important interest in preventing

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[169] *Id*.
[170] *Slattery*, 61 F.4th at 288–89.
[171] *Americans for Prosperity*, 141 S. Ct. at 2384; *see also Slattery*, 61 F.4th at 286 (requiring that a regulation be "the least restrictive means to achieve a compelling governmental interest" to survive strict scrutiny).
[172] *Id.* (cleaned up) (quoting *Button*, 371 U.S., at 433).

wrongdoing by charitable organizations."[173] But that interest is "a dramatic mismatch" when viewed through the lens of the drastically intrusive and overbroad remedy she seeks.[174] Just as California's interest was not served by Schedule B disclosures because those disclosures did not do "anything to advance the Attorney General's investigative, regulatory, or enforcement efforts," [175] the NYAG cannot show that her requests for a compliance monitor or "independent governance expert" are narrowly tailored to achieve any legitimate governmental purpose, or the least restrictive means of achieving a compelling governmental interest. Nor, indeed, has she even attempted to make such a showing.

The lower court has already recognized (in a decision issued before the NYAG inserted its requests for a monitor and "governance expert") that "if proven," the NYAG's allegations of misconduct "can be addressed by the targeted, less intrusive relief she seeks through other claims in her Complaint."[176]

The NYAG's requests thus cannot survive strict or exacting scrutiny. As the U.S. Supreme Court said in rebuking Virginia's similar attempt to invoke ethical regulations to deter the First Amendment-protected advocacy of the NAACP,

> it is no answer to the constitutional claims asserted by petitioner to say, as the Virginia Supreme Court of Appeals has said, that the purpose of

[173] *Id.* at 2385–86.
[174] *Id*.
[175] *Id*.
[176] NYSCEF No. 611 at 2.

> these regulations was merely to insure high professional standards and not to curtail free expression. For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights. [177]

The lower court had an obligation to searchingly consider the First Amendment implications of imposing a monitor and "independent governance expert" on the NRA against its will.[178] It failed to do so. Because the imposition of a compliance monitor would violate the associational rights of the NRA and its members and create a chilling effect on its advocacy, and because the restrictions the NYAG seeks are not narrowly tailored to the harm the NYAG ostensibly seeks to mitigate, the Court should reverse the lower court and dismiss the NYAG's requests for a compliance monitor and "governance expert" as a matter of law.

C. THE NYAG'S CLAIM FOR A COMPLIANCE MONITOR AND "GOVERNANCE EXPERT" MUST BE DISMISSED BECAUSE THE EPTL DOES NOT AUTHORIZE SUCH RELIEF AND THE COURTS LACK INHERENT POWERS TO IMPOSE SUCH OFFICIALS.

The NYAG's requests for a compliance monitor and "governance expert"

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[177] *Button*, 371 U.S. at 438–39.

[178] *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 282 (1974) ("The Court has often recognized that in cases involving free expression we have the obligation, not only to formulate principles capable of general application, but also to review the facts to insure that the speech involved is not protected under federal law."): *San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1233–34 (9th Cir. 1997) (requiring particularly close review of preliminary injunction cases implicating the First Amendment "so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression") (internal quotation marks and citations omitted); *Gold v. Mid-Atl. Reg'l Council of Carpenters*, 407 F. Supp. 2d 719, 724 (D. Md. 2005).

must be dismissed because they are not authorized by the statute the NYAG relies upon, the EPTL.[179] Section 8-1.4(m) of the EPTL does not give the NYAG or the Court the power to impose a compliance monitor or a "governance expert" on a non-proft. It states simply that "[t]he attorney general may institute appropriate proceedings to secure compliance with this section and to secure the proper administration of any trust, corporation or other relationship to which this section applies."[180] But that just grants standing to the NYAG to pursue remedies otherwise authorized by the EPTL; it does not itself create any remedies.

The lower court's conclusion that EPTL § 8-1.4(m), by granting standing to the NYAG to pursue certain actions, also authorizes the court to impose a compliance monitor, is fatally flawed. Courts have repeatedly warned that the existence of standing should not be conflated with the existence of a cause of action, much less a specific remedy.[181] Further, sources are clear that EPTL § 8-1.4(m) merely grants standing to the NYAG to bring certain suits, but authorizes

[179] *See* R. at A-7.164.
[180] EPTL § 8-1.4(m).
[181] *See Bond v. United States*, 564 U.S. 211, 218 (2011) ("[T]erms 'cause of action' and 'standing' [are] distinct concepts [although they] can be difficult to keep separate"); *see also U.S. Bank Nat'l Ass'n v. Nelson*, 36 N.Y.3d 998, 1005 (2020) (Wilson, J., concurring) (citing *Bond* and noting that "[t]he U.S. Supreme Court . . . cautioned against confusing standing with the existence of a cause of action."). The Attorney General, "like all other parties to actions, must show an interest in the subject-matter of the litigation to entitle [her] to prosecute a suit and demand relief." *People ex rel. Spitzer v. Grasso*, 54 A.D.3d 180, 198 (1st Dept 2008)

no specific remedies.[182]

A court does not have inherent power to appoint a compliance monitor over the objection of one of the parties.[183] "It is well settled that inherent power is an extremely narrow, carefully circumscribed doctrine."[184] Courts may not substitute their own remedies for those created by the legislature.[185] "Under the State Constitution the authority to regulate practice and procedure in the courts is delegated primarily to the Legislature."[186] Recourse to "the inherent judicial power is appropriate only when the problem addressed is not subject to legislative control."[187] "There is nothing in the development or the prior use of the doctrine of 'inherent powers' that would support its extension beyond matters of court

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[182] *See* Developments in the Law: Nonprofit Corporations, 105 HARV. L. REV. 1590, 1595 & n. 29 (1992) (relying on statement in the Uniform Supervision of Trustees for Charitable Purposes Act (1954) that "[t]he Attorney General may institute appropriate proceedings . . . to secure the proper administration of any . . . relationship to which this act applies" for the proposition that "[t]ypically, statutes vest the power to enforce the duties of the trustees of charitable trusts in state attorneys general"); Issues Regarding Corporate Structure, IRS Approval, State Regulation, Liability, Governance & Operation of New York & Delaware Nonprofits, 20100608A NYCBAR 1, 78 (characterizing EPTL 8-1.4(m) as part of the "Attorney General['s] broad statutory authority to prosecute and defend legal actions to protect the interests of the State and the public").

[183] *Cobell*, 334 F.3d at 1140–41 (noting that "neither the district court nor the plaintiffs point to any case or other authority suggesting a district court has inherent power to appoint a court monitor" and holding that "the district court does not have inherent power to appoint a monitor" with "extensive duties" "over a party's substantial objection").

[184] *Fludd v. Goldberg*, 51 A.D.3d 153, 157 (1st Dept 2008); *see also Matter of Kisloff v. Covington*, 73 N.Y.2d 445, 450–52 (1989) (rejecting the idea that a trial court can invoke its inherent authority to re-enter a case, post-sentencing, as it sees fit).

[185] *See, e.g., Atkinson v Ormont Mach. Co., Inc.,* 102 Misc 2d 468, 469 (Sup. Ct. Kings County 1979).

[186] *A.G. Ship Maint. Corp. v. Lezak*, 69 N.Y.2d 1, 5–6 (1986) (citing N.Y. Const. art. VI, § 30).

[187] *Alvarez v. Snyder*, 264 A.D.2d 27, 40 (1st Dept 2000) (Saxe, J., concurring).

procedures."[188]

Thus, "where a statutory scheme contains private or public enforcement mechanisms, this demonstrates that the legislature considered and decided what avenues of relief were appropriate."[189] And in spelling out specific remedies, the legislature precludes courts from inventing different, non-statutory remedies.[190] "When the legislature has made express provision for civil remedy, albeit a narrower remedy than the plaintiff might wish, the courts should ordinarily not attempt to fashion a different remedy, with broader coverage, on the basis of a different statute addressing the same wrong."[191] "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."[192] That is, "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."[193] Thus, where a statutory scheme specifically delineates a particular remedy, it implicitly excludes others.

This is inference is strongest where, as in this case, the legislature "has

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[188] *Id*.
[189] *Ortiz v. Ciox Health LLC*, 37 N.Y.3d 353, 362 (2021).
[190] *Mark G. v. Sabol*, 93 N.Y.2d 710, 720 (1999) ("The Legislature specifically considered and expressly provided for enforcement mechanisms . . . Given this background, it would be inappropriate for us to find another enforcement mechanism beyond the statute's already 'comprehensive' scheme.").
[191] *Ortiz*, 37 N.Y. 3d at 361.
[192] Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 19 (1979).
[193] *Id*. (cleaned up).

enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement."[194] Indeed, the New York Court of Appeals has held that the N-PCL creates just such a "comprehensive enforcement scheme" for non-profits.[195]

The NYAG's request for a compliance monitor to "ensure the proper administration of the charitable assets" is not authorized by any statute, or by any inherent authority of the court. Further, such an extra-statutory remedy cannot be granted where the legislature has created a detailed and extensive remedial scheme. Multiple provisions of the EPTL, N-PCL, and the Executive Law make clear that, when the legislature intends to create a cause of action or a remedy, it uses significantly more specific language to do so. [196] For example,

> • The fourth sentence of EPTL 8-1.4(m) empowers the Attorney General to seek judicial "removal" of any persons responsible for trustee's failure to file reports required by EPTL 8-1.4.
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> • Under EPTL 8-1.9(c)(4), "[t]he attorney general may bring an action to enjoin, void or rescind any related party transaction . . . that violates any provision of this article or was otherwise not reasonable or in the best interests of the trust at the time the transaction was approved, or to seek restitution, and the removal of trustees or officers, or seek to require any person or entity to [perform certain specified acts]."

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[194] *Astellas US Holding, Inc. v. Fed. Ins. Co*., 66 F.4th 1055, 1075 (7th Cir. 2023).
[195] *People ex rel. Spitzer v. Grasso*, 11 N.Y.3d 64, 70 (2008)
[196] "When two statutes are in pari materia 'they must be read together and applied harmoniously and consistently.'" *Rector, Church Wardens & Vestrymen of St. Bartholomew's Church, Inc. v. Committee to Preserve St. Bartholomew's Church Inc.*, 84 A.D. 2d 309, 315–16 (1st Dept 1982). This applies to the EPTL, N-PCL, and the Executive Law, which together create an integrated statutory scheme of non-profit regulation.

> • Under N-PCL 720(a), "[a]n action may be brought against one or more directors, officers, or key persons of a corporation to procure a judgment for the following relief: (1) To compel the defendant to account for his official conduct in the following cases: (A) The neglect of, or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his charge. (B) The acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect of, or failure to perform, or other violation of his duties. (2) To set aside an unlawful conveyance, assignment or transfer of corporate assets, where the transferee knew of its unlawfulness. (3) To enjoin a proposed unlawful conveyance, assignment or transfer of corporate assets, where there are reasonable grounds for belief that it will be made."
>
> • Executive Law 175(2) states, "In addition to any other action or proceeding authorized by law and any action or proceeding by the attorney general, the attorney general may bring an action . . . in the name and in behalf of the people of the state of New York, against a charitable organization . . . to enjoin such organization . . . from continuing the solicitation . . . of funds . . . whenever the attorney general shall have reason to believe that the charitable organization . . . has violated any of the provisions of this article."

In contrast, in the relevant portion of the first sentence of EPTL 8-1.4(m), the legislature did not use such specific language and did not create a separate cause of action or a separate remedy.

Moreover, like the term "compliance monitor," the term "governance expert" does not appear anywhere in the EPTL, N-PCL, or Executive Law. "Governance experts" as contemplated by New York law typically take the form of trial testimony experts utilized where juries stand to benefit from detailed

knowledge of corporate roles, responsibilities, and liabilities.[197] The NYAG's vague request for a governance expert provides no information to determine either from where it believes the authority to appoint a governance expert flows, or what duties the governance expert would undertake.

Moreover, the NYAG already pursues the remedies specifically established by the EPTL and statutes in her additional causes of action. Thus, the NYAG's Thirteenth Cause of Action, urges that the "Court should enjoin, void or rescind the unlawful related party transactions, and award damages and such other appropriate remedies, in law or equity to ensure compliance with the requirements of the law."[198] The NYAG here relies on N-PCL § 112(a)(10), which grants the Attorney General the authority to initiate legal action or special proceedings for the purpose of obtaining an injunction, preventing any related party transaction, and pursuing damages.

In another distinct claim, the NYAG's Fourteenth Cause of Action requests a court judgment against the NRA compelling the removal of any officer, director, or trustee who has contravened the whistleblower policy mandated by N-PCL § 715-b and EPTL § 8-1.9. And in its Fifteenth Cause of Action, the NYAG alleges

[197] *See, e.g., United States v. Brooks*, No. 06-CR-550(S-1) (JS), 2010 WL 291769 (E.D.N.Y. Jan. 11, 2010) (referencing governance experts in the context of trial testimony); *Pereira v. Cogan*, 281 B.R. 194 (S.D.N.Y. 2002) (same).
[198] R. at A-7.176.

that the NRA made materially misleading statements in its regulatory filings, which constitutes an alleged violation of the Executive Law. Consequently, the NYAG seeks, under Section 175(2)(d) of the Executive Law, an injunction to prohibit the NRA from soliciting or collecting funds on behalf of any charitable organization operating within the State.

Moreover, the N-PCL offers still more remedies, such as the appointment of a "receiver of the property of a corporation" or the dissolution of the corporation itself. Notably, the NYAG has either failed to pursue these additional remedies or seen them dismissed by the court below.[199] Indeed, the N-PCL dedicates the entirety of its Article 12, to receiverships. Article 12 extensively covers the six specific circumstances in which the court may appoint a receiver, the criteria for their removal, their responsibilities, the length of their service, and various other details.[200] And still further references to receiverships and the procedure by which they may be imposed are found in multiple other articles of the N-PCL.[201]

A receiver is "an extraordinary remedy to be employed with the utmost caution and granted only on a showing of clear necessity to protect a plaintiff's

[199] NYSCEF No. 611 at 2.
[200] *See* N-PCL §§ 1211–1218.
[201] *See, e.g.*, N-PCL 112(b)(4), 517(b), 1008(a)(11), 1111, 1114 (where "[a]n action . . . for the dissolution [is] discontinued," "the court shall . . . direct any receiver to redeliver to the corporation all its remaining property").

interest."[202] Here, the NYAG's request for a monitor seeks to conduct an end-around the strict standards governing the appointment of a receiver.

In sum, when the legislature envisioned the appointment of a third party to oversee certain aspects of a corporation's operations, it demonstrated a meticulous approach by providing explicit guidelines to assist the courts in making such appointments.[203] Under such circumstances, the courts may not fashion new, extra-statutory remedies (like the imposition of a compliance monitor or "governance expert").

In *Spitzer v. Grasso*, the New York Court of Appeals acknowledged the comprehensive nature of the N-PCL as a statutory framework governing not-for-profit corporations organized under New York law. In that case, the court dismissed a common law unjust enrichment claim as inconsistent with the provisions of the N-PCL, which sets forth more stringent requirements. The *Grasso* court found that "a side-by-side comparison of the challenged claims and the statutory claims reveals that the Attorney General has crafted four causes of

[202] *Lawsky v. Condor Cap. Corp*., No. 14 CIV. 2863 CM, 2014 WL 2109923, at *14 (S.D.N.Y. May 13, 2014) (cleaned up) (quoting *SEC v. Republic Nat'l Life Ins. Co.*, 378 F.Supp. 430, 438 (S.D.N.Y.1974).

[203] *N.L.R.B. v. SW Gen., Inc*. 137 S. Ct. 929, 940 (2017); *see also Rector, Church Wardens & Vestrymen of St. Bartholomew's Church, Inc.*, 84 A.D.2d at 315–16 ("When two statutes are *in pari materia* 'they must be read together and applied harmoniously and consistently.'").

action with a lower burden of proof than that specified by the statute."[204] In doing so, the Attorney General sought to "overrid[e] the fault-based scheme codified by the Legislature . . . thus reaching beyond the bounds of the Attorney General's authority.[205]

Grasso's reasoning applies here.[206] In both the N-PCL and the EPTL, the legislature explicitly granted the Attorney General various causes of action and remedies, including the provision for the appointment of a receiver as outlined in Article 12 of the N-PCL. Notably, the legislature did not include provisions for the appointment of a compliance monitor or a governance expert. EPTL 8-1.4(m) simply refers to "appropriate proceedings . . . to secure proper administration of a trust, corporation, or other relationship." Interpreting the EPTL to authorize extra-statutory remedies would go beyond the boundaries of the Attorney General's authority and, much like *Grasso*, would override the legislative scheme that has been codified.[207]

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[204] 11 N.Y.3d at 69 (also referring to the N-PCL as the "codification of the Attorney General's traditional role as an overseer of public corporations").
[205] *Id*.
[206] *Id.* at 70.
[207] *Id*. at 70–71; see also *Lefkowitz v. Parker*, 30 N.Y.2d 964, 965 (1972) (dismissing proceeding brought by the NYAG and reasoning that the statute under which the proceeding was brought did not grant standing to the NYAG); *Bank of Columbia v. Att'y Gen*., 3 Wend. 588, 614 (N.Y. 1829) (determining that the statute in question did not establish the authority that the NYAG sought to exercise and that neither the NYAG nor the court were able to modify or alter the existing statutory scheme).

In fact, the relief sought in the First Cause of Action is unprecedented. Typically, when the Attorney General seeks injunctive relief under EPTL 8-1.4(m), it is in the form of a prohibitory injunction rather than the mandatory injunction sought in this case. For example, in *Schneiderman v. James*,[208] the Attorney General sought a permanent injunction to prohibit an officer of a not-for-profit organization from holding any officer or director positions within charitable entities organized under New York law.[209] Likewise, in *People v. Lower Esopus River Watch, Inc.*,[210] the NYAG sought an injunction to bar a board member from serving in any capacity for a charitable entity.

Despite EPTL 8-1.4(m) being in effect since 1967,[211] it appears that the Office of the Attorney General has sought the appointment of a compliance monitor under this provision in only one other case. The NRA is not aware of any case where a New York court, pursuant to EPTL 8-1.4(m) or any other law, has imposed a compliance monitor of governance expert upon a corporation without that corporation's consent. The rarity with which this remedy is sought or imposed demonstrates that the EPTL and the N-PCL's specific remedies may not be

[208] 971 N.Y.S.2d 73, *1 n.4 (Sup. Ct., New York County 2013).
[209] The question of whether the NYAG possesses the authority to seek the prohibition of an officer from serving in any organization organized under New York law remains uncertain. *See, e.g.*, EPTL 8-1.4(m) (authorizing removal from service, not a bar to any service).
[210] 975 N.Y.S.2d 369 (Sup. Ct., Ulster County 2013).
[211] *See* Turano, Practice Commentary, N.Y. Est. Powers & Trusts Law § 8-1.4 (McKinney).

"supplemented" with remedies that are not authorized by the relevant statutes.

In sum, the remedy of a compliance monitor is not authorized by the EPTL, the N-PCL, or the "inherent authority" of the courts.

D. REQUIRING THE COMPLIANCE MONITOR TO "REPORT TO THE ATTORNEY GENERAL" AND "ENSURE PROPER ADMINISTRATION OF" THE NRA'S ASSETS IS AT ODDS WITH THE TRADITIONAL REQUIREMENTS THAT A COMPLIANCE MONITOR EXERCISES ONLY DELEGATED JUDICIAL POWERS AND CANNOT SPEAK *EX PARTE* TO AN ADVERSARIAL PARTY.

Finally, the NYAG's request for a court-imposed compliance monitor is at odds with the traditional nature and role of a compliance monitor.

First, a compliance monitor cannot be imposed on a party over its objection to punish it for alleged wrongdoing. Current U.S. Department of Justice Guidelines state clearly: "a monitor should never be imposed for punitive purposes."[212] Further, these guidelines make clear that "the scope of any monitorship should be appropriately tailored to address the specific issues and concerns that created the need for the monitor."[213]

The NYAG's request for a monitor in this case runs afoul of these standards. She seeks a monitorship that is punitive and imposed against the NRA's substantial

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[212] Kenneth Polite, Jr., *Revised Memorandum on Selection of Monitors in Criminal Division Matters*, U.S. DEPARTMENT OF JUSTICE, March 1, 2023, at 2, https://www.justice.gov/criminal-fraud/file/1100366/download.
[213] *Id.* at 4.

objection based on its First Amendment rights and the chilling effect that a monitor would create. Imposition of a compliance monitor over a party's objection is a "coercive sanction" and thus at odds with the fundamental purpose of a monitor.[214] The parties do not dispute that there has never been a single case in which a New York court granted the appointment of a compliance monitor or a governance expert pursuant to EPTL 8-1.4(m) against the objection of a non-profit.[215]

Further, the NYAG specifies no limits whatsoever on the monitor's power.[216] Instead, she broadly seeks an "independent" monitor with responsibility "to report to the Attorney General" to "ensure the proper administration of" the NRA's assets.[217] But open-ended grant of sweeping powers runs afoul of judicial standards underpinning the usage of monitors. In *United States v. Apple Inc*., the Second Circuit found that a monitor appointed pursuant to Federal Rule of Civil Procedure 53 must conform to judicial standards of conduct. "Checks on the monitor's conduct include . . . the ethical limitations of the Code of Conduct for United States Judges."[218] This code is applicable because it governs "anyone who is an officer of

[214] *Acosta*, 884 F.3d at 1238–39.
[215] The NYAG conceded this point in her brief to the lower court. *See* R. A-812–A-854.
[216] *United States v. Apple Inc.*, 787 F.3d 131, 134 (2d Cir. 2015) (noting that "the fairness and integrity of the courts can be compromised by inadequate constraint on a monitor's aggressive use of judicial power.").
[217] R. at A-7.164.
[218] *Apple, Inc.*, 787 F.3d at 140.

the federal judicial system authorized to perform judicial functions."[219]

This language is similar to the New York Code of Judicial Conduct. That code provides that "[a]ll other persons . . . who perform judicial functions within the judicial system shall comply" with its rules.[220] New York's enabling statutes for court-appointed referees are CPLR §§ 3104, 4001, 4201, 4301–4321. While it is unclear what statute the NYAG believes would govern the appointment and conduct of the compliance monitor in this case (if any), if the compliance monitor is court-appointed, they would be considered "referees" performing delegated judicial functions and subject to the New York Code of Judicial Conduct.

And as an agent of the Court, performing delegated judicial functions,[221] a compliance monitor would lack the power "to report to the Attorney General" or "ensure the proper administration of" the NRA's assets.[222] The U.S. Supreme Court has warned that "[t]he use of masters is to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause, and not to displace the court."[223] Requiring the monitor to "report to the Attorney General" would violate

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[219] *Id.* at n. 5.
[220] NY Code of Judicial Conduct § 100.6(A).
[221] *Id.* at 140–141 (monitors may not engage in "improper *ex parte* communications as well as other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers" (cleaned up)).
[222] R. at A-7.164.
[223] *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957) (cleaned up); *see also Meeropol v. Meese*, 790 F.2d 942, 961 (D.C. Cir. 1986) ("If the master makes significant decisions without

fundamental ethical principles pertaining to the monitor's appointment—particularly, the monitor's independence and obligation to refrain from *ex parte* contacts. A Special Master with "with responsibility to report to the Attorney General"—the NRA's litigation adversary who has repeatedly called for its total destruction—could never be impartial, would be required to speak *ex parte* to the Attorney General, and would be subject to immediate recusal.[224] So too, the NYAG cites no precedent for a court appointing "an independent governance expert" to "advise the Court on reforms necessary to the governance of the NRA"[225]—and developing governance reforms for a non-profit is a task far afield from any traditional judicial function.

The NYAG's request for a compliance monitor thus is fundamentally flawed. Neither fish nor fowl, the sort of compliance monitor requested by the NYAG has no precedent. It is authorized by no statute. And such a compliance monitor would not be exercising any inherent judicial power, but instead wide-ranging powers heretofore reserved to receivers. The NYAG's request for the appointment of such an official must be dismissed as a matter of law. So too with respect to the NYAG's request for "an independent governance expert."

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careful review by the trial judge, judicial authority is effectively delegated to an official who has not been appointed pursuant to article III of the Constitution.").

[224] *In re Brooks*, 383 F.3d 1036, 1046 (D.C. Cir. 2004) (Special Master must be recused if "an observer apprised of all the facts would reasonably question his impartiality.").

[225] R. at A-7.164.

V. CONCLUSION

The lower court's decision denying the NRA's Motion to Dismiss the First Cause of Action of the Second Amended Verified Complaint should be reversed and remanded with instructions to grant the NYAG's Motion to Dismiss the First Cause of Action of the Second Amended Verified Complaint and dismiss the NYAG's requests for the appointment of "an independent compliance monitor with responsibility to report to the Attorney General and the Court to ensure the proper administration of the charitable assets pursuant to EPTL § 8-1.4" and "an independent governance expert to advise the Court on reforms necessary to the NRA's governance to ensure the proper administration of charitable assets pursuant to EPTL § 8-1.4."

Dated: July 3, 2023

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VI. PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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STATEMENT PURSUANT TO CPLR § 5531

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,

– against –

THE NATIONAL RIFLE ASSOCIATION OF AMERICA,

Defendant-Appellant,

– and –

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

Defendants.

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1. The index number of the case in the court below is 451625/20.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on or about August 6, 2020, by filing of a Summons and Verified Complaint. Issue was joined on or about February 23, 2021, by service of a Verified Answer.

5. The nature and object of the action involves alleged negligence.

6. This appeal is from the Decision and Order of the Honorable Joel M. Cohen, dated October 3, 2022, which denied Defendant The National Rifle Association of America's motion to dismiss the first cause of action of the Second Amended Complaint.

7. This appeal is on the Appendix method.