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

THE PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York,	:	
Petitioners,	:	Index # 451825/2019
-against-	:	Hon.
ACKERMAN MCQUEEN and NATIONAL RIFLE ASSOCIATION OF AMERICA,	:	
Respondents.	:	

MEMORANDUM OF LAW IN OPPOSITION TO THE ATTORNEY GENERAL'S SPECIAL PROCEEDING AND APPLICATION TO COMPEL RESPONDENT ACKERMAN MCQUEEN TO COMPLY WITH AN INVESTIGATORY SUBPOENA

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ATTORNEYS FOR THE NATIONAL RIFLE ASSOCIATION OF AMERICA

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PRELIMINARY STATEMENT

The New York State Office of the Attorney General (the "OAG") styles its Petition as a proceeding to compel production of documents by Ackerman McQueen, Inc. ("AMQ") pursuant to a subpoena dated July 8, 2019 (the "Subpoena"). However, as the OAG admits, AMQ never refused to produce the subpoenaed documents—instead, the OAG has refused to receive them, until and unless the documents can be secreted from AMQ's longtime client and principal, the National Rifle Association of America (the "NRA"). The power to enforce secrecy in connection with a third-party document subpoena is one for which it has been unable to cite any authority. The OAG instigated the current dispute in the apparent hope of forging new case law that will enable it to steamroll valid objections to civil subpoenas, vitiate agency relationships, and undermine principals' privileges in this case and others. The Court should decline the OAG's invitation to expand the state's subpoena power, and should dismiss the Petition.

For decades, AMQ served as the NRA's agent and its most trusted collaborator. AMQ employees performed roles functionally equivalent to those of NRA employees, and became party to the NRA's most sensitive communications and information. For example, AMQ employees sought and received legal advice from the NRA's General Counsel, and learned the identities of NRA donors.[1] The relationship was one of extensive trust and confidence, characterized by common-law fiduciary duties of loyalty and confidentiality on the part of AMQ to the NRA which were codified in the parties' Services Agreement. Pursuant to these duties, when AMQ receives a subpoena seeking NRA-related documents, it is required to notify the NRA so that the NRA may take lawful steps to protect its interests, including by interposing objections and by redacting and logging privileged material.

[1] *See* discussion *infra* at 5-6.

Unlike contractual nondisclosure obligations analogized by the Petition (*e.g.*, the confidentiality clause in the *Cosby* case),[2] AMQ's obligation to apprise the NRA of outgoing document productions was not imposed in the aftermath of an alleged crime in order to conceal events from authorities. Rather, AMQ's duty of confidentiality was a foundational feature of a longstanding, lawful business relationship—it is the basis on which AMQ was entrusted, in the first place, with the material sought by the Subpoena. Moreover, AMQ's duties have been adhered-to throughout the OAG's investigation (and a contemporaneous regulatory inquiry), without any discernible burden on document production. The NRA has been presented with outgoing batches of documents by AMQ on two occasions; within days, it has completed its privilege review and (where applicable) furnished a privilege log. Similarly, when the OAG subpoenaed another NRA contractor—the NRA's accounting firm—the NRA reviewed outgoing documents and logged those which were privileged. To date, the OAG has not challenged any of the NRA's privilege logs.

Against this backdrop, the NRA was surprised to receive a telephone call from the OAG days before the filing of this Petition, demanding that the NRA stipulate to void AMQ's nondisclosure obligation as a matter of public policy. Incredibly, the OAG refused to explain why it required that extraordinary relief. Nonetheless, in an effort to reach some accommodation, NRA counsel explained that the NRA had rapidly consented to the production of every document identified by AMQ to date in response to the Subpoena, and promptly provided privilege logs to the OAG and regulators— and if there were additional documents outstanding from AMQ, the NRA was not the cause of the bottleneck. The OAG sharply responded that they did not "want to

[2] *See* Memorandum of Law in Support of the Attorney General's Special Proceeding and Application to Compel Respondent Ackerman McQueen to Comply with an Investigatory Subpoena ("Mem. Supp. Pet.") at 14-17; discussion *infra* at 17-18.

talk about [AMQ]" and, indeed, the impetus to "talk to" the NRA about what documents were being sought "gets at the whole problem." The OAG stated that they did not want the NRA "monitoring" their investigation.

This was a familiar theme. The OAG had previously subpoenaed the NRA's accounting firm, insisting unsuccessfully that the firm conceal the subpoena from the NRA in violation of the Internal Revenue Code.[3] Similarly, the Subpoena that is now before the Court contains an instruction to AMQ that its existence and any response be kept secret.[4] Although the Petition states that the NRA purports to "preview and potentially veto"[5] any document production, the NRA's "veto" power is circumscribed to privileged material,[6] which it has promptly and transparently logged. Thus, the real controversy before the Court is whether the NRA should be able to "preview" subpoenas issued to its agent, and documents being produced in response, as a means of asserting its privileges. Although courts have previously found that government investigators have no universal, by-default obligation to notify investigative subjects about third-party subpoenas,[7] no authority empowers the OAG to forbid the recipient of the third-party subpoena from making the disclosure on its own.[8] And where, as here, a principal has carefully bargained

[3] *See* Frazer Aff. Ex. F (Letter to J. Frazer from C. Weller dated May 15, 2019).
[4] *See* Verified Petition ("Pet."), Ex. 8 at 1 (instructing AMQ "not to disclose the existence of this subpoena, its contents, or any subsequent communications with the Office of the Attorney General").
[5] *See, e.g.*, Pet. para. 29.
[6] Indeed, in an effort to avoid this dispute, the NRA offered to stipulate in writing that it would only redact and log privileged material and, for the avoidance of doubt, would waive any potential nondisclosure rights with respect to nonprivileged material. The NRA received no response to its offer. *See* discussion *infra* at 12-13.
[7] *See* Mem. Supp. Pet. at 18, *citing S.E.C. v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984).
[8] Indeed, even in the context of a grand jury subpoena (where the law typically favors secrecy), the witness receiving the subpoena is free to disclose it—and outgoing documents may be subject to a principal's privilege review. *See, e.g.*, *See, e.g.*, *Matter of Grand Jury Applications for Court-Ordered Subpoenas and Nondisclosure Orders*, 142 Misc. 2d 241, 248 (N.Y. Sup. 1988) (noting that witnesses are generally exempt from secrecy provisions pertaining to grand jury subpoenas, and questioning whether it is even within the power of a court to impose a nondisclosure order on a witness); *In Re Grand Jury Subpoenas 04-124-03 and 04-124-05*, 454 F.3d 511, 523 (6th Cir. July 12, 2006) (reversing a district court order that a denied motion, by investigative target, to conduct a privilege review of documents subpoenaed by a grand jury from a third party, and noting that relying on a government "taint team" to identify potentially privileged documents would leave "the government's fox . . . in charge of the [target's] henhouse . . . [where it may] err by neglect or malice, as well as by honest differences of opinion" in identifying privileged documents.").

for an assurance from its agent that it will receive such a disclosure, and has historically relied on that framework as a means of asserting important privileges, no public policy requires the Court to upend the parties' arrangement for the sake of secrecy.

Importantly and regrettably, the NRA and AMQ are now adverse to one another in multiple lawsuits, wherein the NRA alleges that AMQ has made affirmative efforts to misappropriate and "leak" the NRA's information in a manner calibrated to cause maximum reputational harm. Thus, the traditional risk considered by courts weighing similar facts—the risk that the investigative subject, here the NRA, could unlawfully collude with the subpoena recipient to destroy documents should it receive notice or a "preview" of a pending production[9]— does not exist.

None of the statutes cited by the OAG as the basis of its subpoena power would have authorized the OAG to issue a subpoena containing the condition now sought to imposed via CPLR § 2308: namely, the condition that AMQ produce documents without notifying the NRA or allowing the NRA to conduct a privilege review. Based on the Petition, AMQ apparently stands ready to produce documents—and the NRA stands ready to conduct its privilege review. Only the OAG's insistence upon secrecy has obstructed compliance. The Court should therefore deny the Petition.

[9] *See, e.g., Nat'l Abortion Fed'n, NAF v. Ctr. for Med. Progress*, 685 F. App'x 623, 627 (9th Cir. 2017), *cert. denied sub nom. Daleiden v. Nat'l Abortion Fed'n*, 138 S. Ct. 1438, 200 L. Ed. 2d 716 (2018), and *cert. denied sub nom. Newman v. Nat'l Abortion Fed'n*, 138 S. Ct. 1439, 200 L. Ed. 2d 716 (2018) ("notifying the target of a third-party subpoena might allow that target to thwart an investigation by intimidating the third party and destroying documents" a risk in "investigations in which a target is unaware of an ongoing investigation").

STATEMENT OF RELEVANT FACTS

A. For Decades, AMQ Served as the NRA's Agent and Fiduciary, Acquiring Voluminous Privileged Information.

For more than thirty years, the NRA relied on AMQ to provide public-affairs advice and services requiring a high level of trust. Together, the NRA and AMQ crafted iconic, impactful Second Amendment advocacy that featured Charlton Heston ("from my cold, head hands") and others. Importantly, during the course of the parties' deep, decades-long collaboration, AMQ acted as the NRA's agent and fiduciary in multiple capacities. AMQ entered into contracts on the NRA's behalf,[10] deployed the NRA's intellectual property across a wide range of media,[11] and liaised closely with NRA members and donors—including by operating public-facing websites that ingested vast troves of personal information (*e.g.*, names, email addresses, and I.P. addresses) about NRA supporters.[12] AMQ and its employees, such as Dan Bongino and Dana Loesch, frequently represented the NRA in public fora.[13]

Given the closeness of their relationship, it is unsurprising that the NRA and AMQ were jointly party to numerous attorney-client and work-product privileged communications. Many AMQ employees were so closely integrated into the NRA's operations that they were functionally equivalent to NRA employees, and directly sought legal advice from NRA counsel regarding work performed for the NRA.[14] AMQ and the NRA also shared common legal interests in multiple pending and anticipated investigations and lawsuits.[15]

[10] *See* Frazer Aff. ¶ 4, Ex. B at 11-13 (First Amended Complaint, Case No. CL19001757 (Vir. Cir. Ct.)), Ex. C at 7-8. (Complaint, Case No. CL19002067 (Vir. Cir. Ct.)).
[11] *See* id.
[12] *See* id.
[13] *See* Frazer Aff. ¶ 4.
[14] *See* Frazer Aff. ¶ 5-6.
[15] *See* Frazer Aff. ¶ 7-8.

The NRA and AMQ memorialized their relationship in successive incarnations of a Services Agreement that specified, *inter alia*, how the NRA's confidential information should be handled and how AMQ's services should be budgeted and billed.[16] The most recent version of the Services Agreement, dated as of April 30, 2017 (as amended May 6, 2018, the "Services Agreement") prohibited AMQ's unauthorized disclosure of nonpublic information entrusted to it by the NRA in the course of its work—a robust duty of confidentiality that befit AMQ's fiduciary role. Although the Services Agreement's confidentiality provision (the "NDA") is silent regarding subpoena compliance, the parties' practice under the contract mirrored that of many principals and agents confronting legal process: when AMQ received a subpoena implicating NRA-related documents, it would inform NRA, allowing the NRA an opportunity to object or move to quash.[17] The parties would then make arrangements for the NRA to review outgoing documents for potential privilege.[18]

Although the NRA and AMQ continued to adhere to the above-described subpoena-response protocol during the months preceding the OAG's inquiry, other aspects of the NRA-AMQ relationship had begun to fray. The main driver of the parties' deepening distrust was AMQ's strange, strident refusal to allow the NRA to inspect the same documents and data the OAG would later seek.

B. In 2018, After the NRA Began to More Rigorously Enforce its Contractual Record-Examination Right, the AMQ Relationship Became Adverse.

Consistent with the scope and importance of services rendered by AMQ for the NRA, the NRA bargained for transparent insight into AMQ's books and records pursuant to the Services Agreement. The Services Agreement incorporated a records-examination clause (the "Records-

[16] *See* Frazer Aff. ¶ 3 .
[17] *See* Frazer Aff. ¶ 10.
[18] *See* id.

Examination Clause") that required AMQ to open its files for the NRA's inspection upon reasonable notice during the contract's term;[19] moreover, immediately upon expiration or termination of the Services Agreement, the contract required AMQ to return the NRA's confidential documents, along with certain fixed assets and creative work-for-hire, to the NRA (such requirement, the "Property-Return Clause").[20]

For years, the NRA conducted annual audits of AMQ's books and records pursuant to the Records-Examination Clause.[21] Frequently, however, the audited records consisted of "samples" assembled in advance by AMQ. During 2018, responding in part to numerous reports that accused AMQ of deceptive billing,[22] the NRA sought greater insight into AMQ's activities and spending—including full access to some of the same categories of records now requested by the Subpoena.[23] AMQ aggressively stonewalled these requests.[24] Ultimately, on April 12, 2019, two weeks before the OAG announced its investigation, the NRA sued AMQ for specific performance of the Records-Examination Clause.[25] AMQ responded to the specific-performance claim in scorched earth fashion: by attempting to oust Wayne LaPierre from the leadership of the NRA, and by threatening (then delivering) a coordinated media "leak" of snippets of employee-expense information curated to cause the NRA maximum reputational harm.[26] In response to these egregious, material breaches of the Services Agreement, the NRA sued AMQ for breach of the NDA.[27] The NRA also terminated the Services Agreement, which triggered the Property-Return

[19] *See* Frazer Aff. Ex. A at 10 (Section VIII), Ex. B. at 13 (¶ 15).
[20] *See* Frazer Aff. Ex. A at 11 (Section XI.E).
[21] *See* Frazer Aff. Ex. B at 13 (¶ 16).
[22] *See* Frazer Aff. ¶ 11.
[23] *See* Frazer Aff. Ex. B at 14 (¶ 18).
[24] *See* Frazer Aff. Ex. B at 14-15 (¶¶ 19-20).
[25] *See* Frazer Aff. Ex. B.
[26] *See* Frazer Aff. Ex. C at 12 (¶¶ 22-23).
[27] *See* Frazer Aff. Ex. C at 12-16 (¶¶ 23-32).

Clause.[28] Importantly, these events—the NRA's demand that AMQ produce documents to it, and the NRA's lawsuit for breach of the NDA—predated and had nothing to do with the OAG's Subpoena.

C. The NRA Confronts Hostilities from New York State That Are Nakedly Politically Motivated, Are Subject to Pending First Amendment Claims, and Justifiably Alarm NRA Members and Donors.

In 2018, amid the polarized political aftermath of the Parkland tragedy, AMQ's apparent billing fraud was not the only concern facing the NRA. New York Governor Andrew Cuomo has a longstanding political vendetta against "Second Amendment Types,"[29] especially the NRA, which he accuses of exerting a "stranglehold" over national gun policy.[30] During 2018, Cuomo boasted to supporters via Facebook that he would leverage New York's regulatory powers to #BankruptTheNRA, thereby silencing its undesirable political speech.[31] And he took steps to deliver on his promise: along with longtime lieutenant Maria Vullo (then the Superintendent of the Department of Financial Services), Cuomo orchestrated a campaign of selective enforcement, backroom exhortations, and public threats designed to coerce financial institutions to blacklist pro-gun advocacy groups, especially NRA.[32] The NRA's First Amendment claims arising from this

[28] *See* Rogers Aff. ¶ 6.
[29] On February 15, 2018, Cuomo appeared on the MSNBC program "The Beat," where he discussed championing legislation that "trampled the Second Amendment." YOUTUBE, Gov. *Andrew Cuomo On Background Checks: "Bunch Of Boloney" | The Beat With Ari Melber | MSNBC*, https://www.youtube.com/watch?v=Tz8X07fZ39o (last visited May 7, 2018). However, Cuomo lamented that his "favorability rating" had dropped thereafter due to "backlash from conservatives and Second Amendment types." *Id.*
[30] *See* Lovett, Kenneth, *Exclusive: Cuomo Fires Back at Jeb Bush for 'Stupid' and 'Insensitive' Gun Tweet*, NY DAILY NEWS (Feb. 17, 2016), http://www.nydailynews.com/news/politics/cuomo-blasts-jeb-stupid-insensitive-gun-tweet-article-1.2534528.
[31] Andrew Cuomo, New York is Forcing the NRA into financial crisis. It's time to put the gun lobby out of business. #BankruptTheNRA, FACEBOOK (Aug. 8, 2018), https://www.facebook.com/andrewcuomo/posts/new-york-is-forcing-the-nra-into-financial-crisis-its-time-to-put-the-gun-lobby-/10155989594858401/
[32] Complaint, Case No. 18-cv-00566-LEK-CFH (N.D.N.Y.); *see also* Clark, Dan, *Federal Judge Allows NRA Lawsuit Against NY to Continue on First Amendment Claims*, NEW YORK LAW JOURNAL, (Nov. 6, 2018), https://www.law.com/newyorklawjournal/2018/11/06/federal-judge-allows-nra-lawsuit-against-ny-to-continue-on-first-amendment-claims/

conduct drew *amicus* support from the ACLU,[33] withstood a motion to dismiss, and are currently pending in the United States District Court for the Northern District of New York.[34] Letitia James, Cuomo's chosen candidate for the Office of the Attorney General, echoed Cuomo's threats from the campaign trail—vowing to pursue the NRA's financial supporters if elected.[35]

Although the NRA regrets New York's antipathy toward the Second Amendment, it does not assert that campaign-trail invective ought to bar the Attorney General from issuing otherwise-lawful subpoenas. However, the NRA seeks maximum protection for personally identifying information pertaining to its members and donors, which is privileged under the First Amendment.[36] As Tyler Schropp, the NRA's Executive Director of the Office of Advancement, attests, "Donors have stated to me that they fear that their spouses or children may be harassed, or that business partners may be pressured to abandon them, by those who bear animosity toward the NRA and its political speech."[37] For that reason, when the NRA solicits donations, it "frequently assure[s] donors that the NRA closely guards their confidential information."[38] Thus, based on his prior experience dealing with donors, Schropp "strongly believe[s] that a compelled bulk disclosure of AMQ's records to the New York Attorney General would alarm donors who interacted with AMQ, and would likely inhibit the NRA's ability to raise funds, particularly if the

[33] Dkt. 49, Case No. 18-cv-00566-LEK-CFH (N.D.N.Y.).
[34] Case No. 18-cv-00566-LEK-CFH (N.D.N.Y.).
[35] *Tish James becomes New York's Attorney General – First Black Woman Elected to Statewide Office*, https://www.ourtimepress.com/tish-james-becomes-new-yorks-attorney-general-first-black-woman-elected-to-statewide-office/
[36] *See* discussion *infra* at 20.
[37] Affidavit of Tyler Schropp ("Schropp Aff.") ¶ 3. *See also id.* ¶ 8 (providing examples of donors who have expressed concerns about the New York Attorney General's animus towards NRA supporters).
[38] *Id.* ¶ 4.

disclosure occurred without any opportunity for the NRA to be informed about the documents being produced and take steps to protect its donors' information."[39]

Because of these considerations, the NRA closely guards its member and donor information, entrusting relevant data only to fiduciaries with strict nondisclosure obligations—such as AMQ. This practice ensures that if a third party possessing such data is subpoenaed, it will cooperate with the NRA to protect the NRA's privileges, including the identities of individual NRA supporters. Unfortunately, this is the protection the OAG aims to eviscerate.

D. Against This Backdrop, the NRA Has Consented Freely to the Production of Documents Possessed by AMQ, Asking Only That It Be Permitted to Redact and Log Privileged Information.

Even before the issuance of the Subpoena, the NRA informed both AMQ and the OAG that it did not object, *per se*, to AMQ's production or disclosure—even voluntarily, absent a subpoena—of information that might be contractually protected.[40] The NRA requested merely that it be alerted to any proposed production, so that it could assert objections or preserve privileges consistent with the parties' practice under the NDA. The NRA received no response from AMQ. Then, on Friday, July 26, 2019, the NRA learned for the first time of the Subpoena's existence, via a cursory letter from AMQ enclosing a proposed production in response to the Subpoena.[41] The NRA swiftly reviewed the documents for privilege, found none, and gave a blanket consent to the proposed production on Tuesday July 30, 2019—less than two business days after receiving notice.[42] The NRA did not lodge objections to the Subpoena because, as far as it was aware, the

[39] *Id.* ¶ 9. *See also id.* ("Moreover, even current and prospective donors who have no interacted with AMQ would likely be alarmed by a voluminous disclosure of other donors' information and could hesitate to donate in the future").
[40] *See* Frazer Aff. Ex. D (J. Frazer email to D. Schertler dated May 17, 2019).
[41] *See* Frazer Aff. ¶ 14.
[42] *See* Frazer Aff. ¶ 14.

documents it had received constituted AMQ's entire proposed production—none were privileged, nor otherwise objectionable as would warrant motion practice.

Although the NRA heard nothing further from the OAG or AMQ regarding the Subpoena until just before this Petition was filed,[43] the NRA has continued to review and consent to proposed productions by AMQ and others in response to government subpoenas.[44] In each instance, the NRA has consented promptly and without exception to the production of all nonprivileged documents. The NRA's privilege claims have been narrowly tailored, promptly logged, and to date remain unchallenged by any subpoena-issuing authority—including the OAG. Accordingly, Petition's accusation that the NRA has made a "blanket and vague assertions of privilege"[45] is confusing and unfounded.

E. The OAG Instigated This Dispute Without Any Legitimate Need for Court Intervention to Obtain Information.

Since the outset of its investigation regarding the NRA, the OAG has apparently insisted upon secrecy in connection with multiple third-party subpoenas. For example, a previous subpoena to the NRA's accounting firm purported to forbid the firm from obtaining the NRA's consent to produce documents,[46] in violation of the Internal Revenue Code.[47] The OAG likewise instructed AMQ not to disclose the existence of the Subpoena to the NRA[48]—although it apparently does not dispute that the NRA has standing to assert privilege and other objections, the

[43] *See* Rogers Aff. ¶¶ 8-11.
[44] *Id.* at ¶ 9.
[45] *See* Mem. Supp. Pet. at 13.
[46] *See* Rogers Aff. ¶ 7.
[47] *See* Frazer Aff. Ex. F (Letter to J. Frazer from C. Weller dated May 15, 2019).
[48] *See* Verified Petition ("Pet."), Exhibit 8 at 1 (instructing AMQ "not to disclose the existence of this subpoena, its contents, or any subsequent communications with the Office of the Attorney General").
[48] *See, e.g.*, Pet. para. 29.

OAG would deny the NRA any meaningful opportunity to do so. During meet-and-confer discussions, the OAG was unable to city any authority supporting its insistence on secrecy.[49]

On August 16, 2019, this Court rejected a request by the NRA to have its counsel participate in the OAG's upcoming interview of its former president and current Board member, Lt. Col. Oliver North, despite the possibility that the interview would touch upon privileged information. The Court based its ruling on assurances that North, a member of the NRA Board of Directors, would have competent counsel present who would make efforts to preserve the NRA's privileges, as well as the OAG's promise not to inquire into potentially privileged areas.[50] Strikingly, the Court expressly limited its reasoning to "live" interviews, as distinguished from document productions, noting: "A document review for privilege is very different than a deposition," because it is "harder . . . to catch privilege" [51] in a substantial volume of documents, compared to live testimony.

To create this dispute, the OAG apparently instructed AMQ to forbear from future document productions in the hope that it could obtain a follow-up ruling enshrining in law, for the first time, its legally-unsupported policy of secrecy in connection with document subpoenas and document productions. On September 26, 2019, the OAG placed a telephone call to the NRA's counsel, purporting to meet and confer regarding the NDA; that call was adjourned until September 27, 2019, due to scheduling conflicts. During the course of the ensuing conversation, the NRA's counsel expressed confusion regarding what, precisely, was being disputed—after all, the NRA had consented to AMQ's entire document production. The NRA offered to promptly review and consent to any additional documents, if additional documents were sought, and said the NRA

[49] *See* Rogers Aff. ¶ 7.
[50] Hearing Transcript at 8:10-14, 8:23-9:4, Aug. 16, 2019, Case No. 158019/2019 (N.Y. Sup. Ct.); Hearing Transcript at 7:6-12, 18:12-15, Aug. 19, 2019, Case No. 158019/2019 (N.Y. Sup. Ct.).
[51] Hearing Transcript at 14:25-15:3, Aug. 16, 2019, Case No. 158019/2019 (N.Y. Sup. Ct.).

would acquiesce to a live interview of AMQ, if the OAG wanted one—but the OAG refused to meet or confer on any of these points. [52] Instead, without providing any context or justification, the OAG simply demanded that the NRA decree its NDA with AMQ to be void as a matter of public policy.[53] Of course, the NRA declined. By email later that day, the NRA reiterated its position, but offered a compromise: it would stipulate to formally waive its rights under the NDA, except with respect to privileged information—which the NRA would agree to redact and log.[54] Rather than respond to the NRA's offer (which it now dismisses as "inflammatory" and "self-serving"), the OAG commenced this proceeding.

ARGUMENTS AND AUTHORITIES

A. The Court Need Not Reach the OAG's Public Policy Arguments, Because the Petition Is Defective: The OAG Fails to Allege Noncompliance With Its Subpoena.

The sole count in this proceeding seeks to compel subpoena compliance under CPLR § 2308.[55] However, that provision (entitled, "Disobedience of subpoena"), only authorizes relief in the event of "failure to comply" with a subpoena—which, with respect to a nonjudicial subpoena *duces tecum*, means that the subpoenaed person "refuses without reasonable cause . . . to produce a book, paper, or other thing which he was directed to produce by the subpoena."[56] Where, as here, a petition pursuant to CPLR § 2308 fails to adequately allege noncompliance with a subpoena, the petition must be dismissed on its merits.[57]

The OAG does not allege, nor can it, that AMQ has refused (or the NRA has caused AMQ to refuse) to produce any documents. Instead, both AMQ and the NRA notified the OAG about the NDA's notice-and-consent mechanic; in compliance with that mechanic, the NRA consented

[52] Rogers Aff. ¶ 9.
[53] *Id.* .
[54] *Id.* at ¶ 11.
[55] *See* Pet. at ¶¶ 39-34.
[56] N.Y. C.P.L.R. 2308(b) (McKinney).
[57] *See, e.g.*, *Maragos v. Town of Hempstead Indus. Dev. Agency*, 174 A.D.3d 611, 614 (2d Dep't 2019).

swiftly to every document that AMQ proposed to produce.[58] Remarkably, the OAG then "instructed [AMQ] to defer any additional document productions . . . if it meant first giving the NRA a right to review" the documents slated for production. In other words, the OAG does not want AMQ's documents unless it can obtain them without the NRA's knowledge.

CPLR § 2308 entitles the OAG to compel AMQ to produce documents, but does not entitle the OAG to inject additional conditions for compliance, such as secrecy, which could not lawfully have been imposed within the four corners of the Subpoena. The OAG cites no case, and counsel are aware of no case, where a party propounding a subpoena ***told the recipient not to produce documents*** unless a requested condition could be attained, then successfully wielded CPLR § 2308 to imbue that request with the force of law. This Court need not be the first to order such an outcome. The NRA and AMQ stand ready to produce documents, and only the OAG's preference for secrecy stands in their way. Because there has been no refusal to comply with the Subpoena, the Petition must be dismissed.

B. No Public Policy Prevents the NRA From Enforcing Its NDA to Redact And Log Privileged Information.

In New York, "in determining whether a contract is illegal[,] the test is not what might be done under the contract, but what the parties intended to do under it."[59] Accordingly, to the extent that the Court reaches questions of public policy with respect to the Services Agreement's NDA, the proper analysis is not whether the provision, as drafted, could conceivably be enforced to violate the law, but whether a "careful balancing" of "all the circumstances" surrounding the parties' actions here precludes enforcement.[60] That fact-specific, as-applied analysis decisively

[58] *See* Rogers Aff. ¶ 9.
[59] 22 N.Y. Jur. 2d Contracts § 137, *citing Commoss v. Pearson*, 190 A.D. 699, 180 N.Y.S. 482 (1st Dep't 1920) (contract for shipping goods deemed legal and enforceable, despite government embargo, because there was no evidence the parties intended to perform the provision in a manner contrary to law).
[60] *See* Restatement (Second) of Contracts § 178 (1981), cmt b.

sustains the NDA. As invoked by the NRA throughout its course of dealing with AMQ (including in response to the Subpoena), the NDA aligns with and advances important public policies of New York State: it protects the First Amendment privileges of innocent third parties (and the attorney-client and work-product privileges of the NRA), while still allowing for prompt disclosure of relevant information. The NDA accords so thoroughly with New York law that even if it were voided, AMQ would retain common-law obligations virtually identical to those the NRA seeks to enforce.

1. The NDA Does Not Create A Novel Legal Right, But Merely Reinforces Common-Law Agency Principles.

Importantly, the disputed NDA provision codifies, but does not materially alter, AMQ's confidentiality obligations as an agent to its former principal, the NRA. As such, AMQ continues to have an active and ongoing fiduciary duty to the NRA, which includes a duty to preserve the confidentiality of the NRA's information absent the NRA's consent.

Agency is a "legal relationship between a principal and an agent" and is fiduciary in nature.[61] Under New York law[62], an agency relationship "results from a manifestation of consent by one person to another that the other shall act on his behalf and subject to his control and the consent by the other to act."[63] Agency requires that both principal and agent agree to the relationship and, where applicable, that mutual understandings between the parties are operative.[64] Control exists where the principal exercises a high degree of authority over the "method and means

[61] *Faith Assembly v. Titledge of New York Abstract, LLC*, 106 A.D.3d 47, 58 (2d Dep't 2013) (internal citations and quotation marks omitted).
[62] The NRA is a not-for-profit organized under the laws of New York. However, its principal place of business is Virginia. Virginia's common law agency law substantially mirrors that of New York. *See Reistroffer v. Person*, 247 Va. 45, 48 (Va. 1994).
[63] *Gulf Ins. Co. v. Transatlantic Reinsurance Co.*, 69 A.D.3d 71, 96-7 (1st Dep't 2009) (internal citations and quotation marks omitted).
[64] *See* Restatement (Third) Of Agency § 8.01 (2006), cmt d.

by which work is to be performed."[65] Importantly, parties need not explicitly enter into a contract for an agency relationship to exist[66]; indeed, even where parties may disclaim agency, courts are not bound by such a disclaimer in "determining their true relationship."[67]

As a fiduciary, an agent's duty to maintain the confidentiality of information entrusted to it by its principal "do[es] not end when the agency relationship terminates."[68] Accordingly, a former agent "is not free to use or disclose a principal's trade secrets or other confidential information" absent the principal's consent.[69] In addition, an agent is "obligated to disclose to [its principal] in plain terms all material facts within the scope of the agency."[70]

For more than thirty years, the NRA relied on AMQ to carry out a substantial part of its business on the NRA's behalf, including but not limited to entering into contracts on the NRA's behalf, deploying the NRA's intellectual property, liaising closely with NRA members and donors, and operating the NRA's websites, all with access to the NRA's most confidential and important information.[71] AMQ and its employees frequently represented the NRA, communicating with the public as the face of the NRA. During this time, the NRA consented, through frequent payments, side-by-side employee relations, and frequent iterations of contractual relationships to AMQ acting on the NRA's behalf in these and countless other capacities.[72] AMQ consented to this agency relationship, too—by accepting payment, performing its duties, and entering into third-party contracts on the NRA's behalf.[73] It is undisputed that the relationship was, notionally, structured

[65] *Quik Park West 57, LLC v. Bridgewater Operating Corp*., 148 A.D.3d 444, 445 (1st Dep't 2017) [need to find better case factually]
[66] *Levine v. Levine*, 184 A.D.2d 53, 61 (1st Dep't 1992) ("An agency may be implied from the parties' words and conduct as construed in light of the surrounding circumstances").
[67] *Gulf*, 69 A.D.3d at 96 (internal citations and quotation marks omitted).
[68] Restatement (Third) Of Agency § 8.05 (2006).
[69] *Id.*
[70] *Scher v. Stendhal Gallery*, 117 A.D.3d 146, 159 (1st Dep't 2014).
[71] *See*, *supra* at 5.
[72] *See* id.
[73] *See* id.

to grant the NRA substantial control over AMQ's actions on its behalf, consistent with agency principles.[74]

Therefore, even if the NDA were void, AMQ would retain a common-law fiduciary duty to seek the NRA's consent before disclosing information entrusted to it in the course of its work. Far from contravening public policy, the NDA aligns closely with longstanding principles of agency law.

2. Contrary to Petitioner's Accusations, the NRA Has Not Used the NDA to "Block" or "Delay" AMQ's Compliance With The Subpoena

Without basis, the Petition alleges that the NRA has invoked the NDA "to prevent, delay, or limit disclosure of relevant materials and testimony sought from third parties."[75] In fact, with the exception of narrowly tailored, uncontested redactions of privileged information, the NRA has not sought to impose any limits whatsoever on cooperation by third parties with the OAG's inquiry—by leveraging the NDA, or otherwise. Even before the issuance of the Subpoena, the NRA advised AMQ that it would consent to AMQ's ***voluntary*** disclosure of relevant information to the OAG, subject to privilege review.[76] And in the sole instance where the NRA invoked the NDA to "monitor" documents slated for production in response to the Subpoena, it completed its review over a single weekend and withheld nothing.[77]

Although the Petition references efforts by the NRA to demand access to its confidential materials pursuant to the Services Agreement, such efforts long predate the OAG's inquiry, and could not reasonably be construed to interfere with AMQ's Subpoena compliance. If anything,

[74] Recent revelations about AMQ's conduct indicate that it undertook additional activities which the NRA did not control—those activities are the subject of multiple lawsuits. *See* Frazer Aff. 11; *see also* Case No. CL19001757 (Vir. Cir. Ct.)); Case No. CL19002067 (Vir. Cir. Ct.)). However, a frolic and detour by a faithless agent does not vitiate its obligations to its principal with respect to activities conducted within the scope of the agency.
[75] Mem. Supp. Pet. at 7.
[76] *See* Frazer Aff. Ex. D.
[77] *See* Frazer Aff. ¶ 14 (discussing weekend doc review after 7/26 subpoena notice)

mustering documents for production to the OAG would facilitate production of the same documents to the NRA, and vice versa. Simply put, the NRA has made extensive efforts to obtain its own documents from AMQ, but has never prevented the OAG from obtaining documents from AMQ.

The cases Petitioner cites, wherein NDAs were invoked to impede criminal investigations (and were thus void as a matter of public policy) stand in stark contrast to the facts here. In *Cosby*, an accused serial rapist sued several alleged victims for breach of a confidential settlement agreement, specifically because they sought to cooperate with a police investigation.[78] His breach-of-contract claims were dismissed. *Fomby-Denson*, likewise, involved an attempt to enforce a nondisclosure provision of a civil settlement agreement in order to prevent, or recover damages for, disclosure of underlying events to criminal authorities.[79] If the NRA had sued AMQ for reporting crimes to the OAG, *Cosby* and *Fomby-Denson* would support dismissal of the NRA's breach-of-contract claims—but the situation before this Court is far different. Here, NRA has not attempted to block disclosure of any criminal activity. Instead, it has invoked the NDA in the context of a civil inquiry and, crucially, has invoked the NDA only with respect to privileged information.

3. No Public Policy Prevents AMQ from Disclosing, or the NRA From "Monitoring," An Outgoing Document Production In Response to a Civil Investigative Subpoena.

Aware that it cannot establish any actual delay or obstruction by the NRA as a consequence of the NDA's enforcement, the OAG alternatively alleges that the NRA's mere "monitoring" of AMQ's proposed document production is so nefarious, and so devastating to the integrity of the

[78] *See Cosby v. American Media, Inc.*, 197 F.Supp.3d 735, 740-41 (E.D.Pa. 2016).
[79] *See Fomby-Denson v. Dept. of Army*, 247 F.3d 1366, 1368 (Fed. Cir. 2001).

OAG's inquiry, that public policy forbids the NRA from being made aware of outgoing document productions and mandates, instead, that a veil of secrecy shroud the OAG's activities.[80]

Although some courts have held that a law-enforcement authority or regulator issuing a subpoena to a third party need not notify the investigative target of the subpoena's existence,[81] this is very different from forbidding—or empowering the OAG to forbid—the subpoena's recipient from making the same disclosure. The latter, greater level of secrecy is what the OAG seeks to mandate as a matter of public policy in this case: it has instructed AMQ to forbear from producing documents until, and unless, the production can occur without notice to the NRA.[82] If the legislature had intended to grant the OAG the power to enforce investigative secrecy in the context of a subpoena *duces tecum* under the statutes at issue here, it would have done so. Instead, New York's statutory scheme provides little if any basis to constrain disclosure by a witness regarding a subpoena he has received, or responsive information he plans to provide—even in the context of a criminal grand jury subpoena,[83] where secrecy is generally paramount.

Moreover, the public policy considerations that favor secreting a third-party subpoena from its target are strongest when the target "is unaware of an ongoing investigation and still possesses material that would be the subject of a subpoena or potential investigation," which it has the motive and opportunity to destroy.[84] By contrast, public policy arguments favoring secrecy are weakest in cases like this one, where the NRA "already knows that . . . law enforcement authorities seek" certain information from AMQ, and lacks the practical ability compel AMQ, a hostile party, to

[80] *See* Mem. Supp. Pet. at 3.
[81] *See, e.g.*, *S.E.C. v. Jerry T. O'Brien, Inc.*, 467 U.S. 735 (1984).
[82] *See* Pet. at 33.
[83] *See, e.g.*, *Matter of Grand Jury Applications for Court-Ordered Subpoenas and Nondisclosure Orders*, 142 Misc. 2d 241, 248 (N.Y. Sup. 1988).
[84] *Nat'l Abortion Fed'n, NAF*, 685 F. App'x at 627.

destroy the subpoenaed material.[85] Instead, the NRA merely seeks to review material slated for production in order to protect its privileges.

4. Public Policy Favors Allowing the NRA to Assert Its Attorney-Client, Work-Product, and First Amendment Privileges.

The attorney-client privilege "protects the need for free, uninhibited exchange of information with an attorney," which is a need "recognized by the public policy of New York."[86] Similarly, public policy strongly favors safeguarding, from government inquest, the identities of members and donors of controversial political groups who seek anonymity.[87] As the United States Supreme Court held in *NAACP v. Alabama*, forced disclosure of such information is "likely to affect adversely the ability of [the group] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate."[88] Here, before launching her investigation, Petitioner vowed to "take down the NRA" by targeting its financial supporters—giving rise to demonstrated chilling effects exactly like those envisioned by the *NAACP* court.[89] Accordingly, to the extent that the NDA preserves the NRA's practical ability to assert its First Amendment associational privileges, its existence and enforcement advance, rather than hinder, an important public policy.

CONCLUSION

For the foregoing reasons, the NRA respectfully requests that the Court deny the Petition in its entirety.

By: */s/ Sarah B. Rogers*
William A. Brewer III

[85] *See id.*
[86] *Prizel v. Karelsen, Karelson, Lawrence & Nathan*, 74 F.R.D. 134, 138 (S.D.N.Y. 1977).
[87] *See, e.g.*, *FAIR*, 547 U.S. at 69.
[88] 357 U.S. at 462-63.
[89] *See also* Schropp Aff. ¶ 3.

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