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21-636-cv
National Rifle Association of America v. Maria T. Vullo

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2021

(Argued: January 13, 2022 Decided: September 22, 2022)

Docket No. 21-636-cv

NATIONAL RIFLE ASSOCIATION OF AMERICA,

Plaintiff-Appellee,

v.

MARIA T. VULLO, both individually and in her former official capacity,

*Defendant-Appellant.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

Before: POOLER, CHIN, and CARNEY, *Circuit Judges*.

Interlocutory appeal from that portion of a decision and order of the United States District Court for the Northern District of New York (McAvoy, *J.*), denying the motion of defendant-appellant Maria T. Vullo,

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* The Clerk of the Court is directed to amend the caption to conform to the above.

the former Superintendent of the New York State Department of Financial Services, to dismiss certain claims against her for qualified immunity. Plaintiff-appellee National Rifle Association of America sued Vullo for violating its rights to free speech and equal protection when she investigated three insurance companies that had partnered with it to provide coverage for losses resulting from the use of guns and encouraged banks and insurance companies to consider discontinuing their relationships with gun promotion organizations. The district court dismissed the equal protection claim on the basis that Vullo was protected by absolute immunity, but it declined to dismiss the free speech claims, concluding that the NRA plausibly alleged its claims and issues of fact existed as to whether she was protected by qualified immunity.

REVERSED AND REMANDED.

ANDREW G. CELLI JR. (Debra L. Greenberger *and* Marissa R. Benavides, *on the brief*), Emery Celli Brinckerhoff Abady Ward & Maazel LLP, NewYork, NY, *for Defendant-Appellant*.

SARA B. ROGERS (William A. Brewer III *and* Mordecai Geisler, *on the brief*), Brewer, Attorneys & Counselors, New York, NY, *for Plaintiff-Appellee*.

CHIN, *Circuit Judge*:

In this case, plaintiff-appellee National Rifle Association of America (the "NRA") claims that defendant-appellant Maria T. Vullo, the former Superintendent of the New York State Department of Financial Services ("DFS"), violated its rights to free speech and equal protection when she investigated three insurance companies that had partnered with it to provide coverage for losses resulting from gun use and encouraged banks and insurance companies to consider discontinuing their relationships with gun promotion organizations. The NRA contends that Vullo used her regulatory power to threaten NRA business partners and coerce them into disassociating with the NRA, in violation of its rights.

In October 2017, based on a referral from the New York County District Attorney's Office (the "DA's Office"), DFS opened an investigation into the legality of certain NRA-endorsed insurance programs that provided coverage for losses caused by licensed firearm use, even in circumstances where the insured intentionally killed or injured someone or otherwise engaged in intentional wrongdoing. Eventually, in 2018, three DFS-regulated entities entered into consent decrees with DFS, whereby they acknowledged that some of their NRA-endorsed insurance programs violated New York law.

In April 2018, in the wake of the tragic school shooting in Parkland, Florida, which resulted in the death of seventeen students and staff, Vullo, in her

capacity as Superintendent of DFS, spoke out against gun violence. She did so through industry-directed "guidance letters" and a press statement issued by the New York State Governor's Office. She called upon banks and insurance companies doing business in New York to consider the risks, including "reputational risks," that might arise from doing business with the NRA or "similar gun promotion organizations," and she urged the banks and insurance companies to "join" other companies that had discontinued their associations with the NRA. J. App'x at 181, 184-7.

Thereafter, multiple entities indeed severed their ties or determined not to do business with the NRA. The NRA then brought this action against Vullo, DFS, then-Governor Andrew Cuomo, and Linda A. Lacewell (who had succeeded Vullo as Superintendent of DFS).[1] The district court eventually dismissed all claims except the First Amendment claims against Vullo, concluding that the NRA plausibly alleged those claims and that issues of fact existed as to whether she was protected by qualified immunity with respect to those claims. Vullo appeals.

The First Amendment forbids government officials from "abridging the freedom of speech." U.S. Const. amend. I; *see Zieper v. Metzinger*, 474 F.3d 60, 66 (2d Cir. 2007). Government officials cannot, for example,

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[1] Vullo left DFS on February 1, 2019. *See* Statement, Maria T. Vullo, N.Y. State Dep't of Fin. Servs. Superintendent, *Superintendent Maria T. Vullo to Depart DFS After Three Years of Service to New Yorkers* (Dec. 19, 2018), https://www.dfs.ny.gov/reports_and_publications/statements_comments/2018/st1812191.

use their regulatory powers to coerce individuals or entities into refraining from protected speech. At the same time, however, government officials have a right – indeed, a duty – to address issues of public concern. Here, for the reasons discussed below, we conclude that the NRA has failed to plausibly allege that Vullo "crossed the line 'between attempts to convince and attempts to coerce.'" *Zieper*, 474 F.3d at 66 (quoting *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003) (per curiam)). Moreover, even assuming that Vullo's actions and statements were somehow coercive, we conclude further that her conduct here – taking actions and making statements in her various capacities as regulator, enforcement official, policymaker, and representative of New York State – did not violate clearly established law. Rather, the only plausible conclusion to be drawn is that Vullo acted reasonably and in good faith in endeavoring to meet the duties and responsibilities of her office.

Accordingly, we REVERSE and REMAND for the district court to dismiss the remaining claims against Vullo.

STATEMENT OF THE CASE

Where the district court decides a qualified immunity defense on a motion to dismiss, we accept the material facts alleged in the complaint as true and draw all reasonable inferences in favor of the plaintiff – here, the NRA. *Liberian Cmty. Ass'n of Conn. v. Lamont*, 970 F.3d 174, 186 (2d Cir. 2020).

I. The Facts

The following facts are drawn from the NRA's second amended complaint (the "Complaint"), the exhibits attached thereto, and documents integral to and referenced in it. *See Cohen v. Rosicki, Rosicki & Assocs., P.C.*, 897 F.3d 75, 80 (2d Cir. 2018).

A. The Investigation

In September 2017, the DA's Office advised DFS of the apparent illegality of an NRA-endorsed affinity insurance program called "Carry Guard." Carry Guard provided coverage for losses caused by licensed firearm use, including criminal defense costs resulting from using a firearm with excessive force to protect persons or property, even if the insured was found to have acted with criminal intent. In other words, it insured New York residents for intentional, reckless, and criminally negligent acts with a firearm that injured or killed another person. Policies issued through Carry Guard were underwritten by Illinois Union Insurance Company, a subsidiary of Chubb Limited, doing business as Chubb ("Chubb"), and administered by Lockton Companies, LLC ("Lockton").

The next month, DFS opened an investigation into Carry Guard, focusing on Lockton and Chubb. The investigation revealed that Carry Guard and at least two other NRA-endorsed programs violated New York insurance law for providing, among other things, insurance coverage for intentional criminal acts. Additionally, it found that the NRA aggressively promoted

Carry Guard without an insurance producer license – a separate violation of New York insurance law. By November 17, 2017, both Lockton and Chubb suspended the Carry Guard program and stopped offering it to New York residents for purchase.

The investigation also revealed that a third entity, the insurance marketplace Lloyd's of London and its related syndicates (together, "Lloyd's"), served as underwriter for at least eleven other NRA-endorsed programs with similar policy coverages. Like Carry Guard, the other NRA-endorsed programs provided liability defense coverage for criminal proceedings resulting from firearm use even where the insured acted with criminal intent.[2] Lockton administered these insurance programs for Lloyd's.

B. The Parkland Shooting

On February 14, 2018, while the investigation was underway, a shooter armed with a semiautomatic weapon opened fire at Marjory Stoneman Douglas High School in Parkland, Florida, killing seventeen high school students and staff.[3] In the wake of the

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[2] The NRA-endorsed insurance program provided by Lockton and Chubb went by the name "Carry Guard," but similar programs provided by Lloyd's went by other names, including "Self-Defense Insurance," "Second-Call Defense Insurance," and "Retired Law Enforcement Officer Self-Defense Insurance." J. App'x at 231 ¶ 6(a)-(c).

[3] *See*, *e.g.*, Bernie Woodall & Zachary Fagenson, *Paradise Lost: Massacre Jolts Florida's 'Safest City,'* Reuters (Feb. 15, 2018,

shooting, the NRA and other gun promotion groups faced intense backlash.[4] Many government officials and major American business institutions spoke out against gun violence, and some companies publicly severed ties with gun promotion organizations like the NRA.[5]

C. The Lloyd's Meetings

Shortly after the Parkland shooting, in late February 2018, Vullo met with senior executives of Lloyd's and one of its United States affiliates.[6] At the meetings, Vullo "presented [her] views on gun control and [her]

4:50 PM), https://www.reuters.com/article/us-florida-shooting-town/paradise-lost-massacre-jolts-floridas-safest-city-idUSKCN1FZ2WY.

[4] *See*, *e.g.*, Daniel Trotta, *Shunned by Corporations, U.S. Gun Entrepreneurs Launch Start-Ups*, Reuters (May 5, 2018, 11:04 AM), https://www.reuters.com/article/usa-guns-nra/shunned-by-corporations-u-s-gun-entrepreneurs-launch-start-ups-idUSL1N1S9255.

[5] *See* Jenna Johnson et al., *Trump, Citing 'Evil Massacre' in Florida, Starts Talking About Gun Control*, Wash. Post (Feb. 20, 2018, 10:37 PM), https://www.washingtonpost.com/politics/trump-citing-evil-massacre-in-florida-starts-talking-about-gun-control/2018/02/20/8da6dd7e-1683-11e8-b681-2d4d462a1921_story.html; *see also* Tim Mak, *NRA Facing Most Formidable Opposition Yet, a Year After Parkland*, NPR (Feb. 14, 2019, 12:02 AM), https://www.npr.org/2019/02/14/693929383/nra-facing-most-formidable-opposition-yet-a-year-after-parkland ("For the National Rifle Association, the year since the Parkland shooting has led to a changing – and less favorable – political landscape.").

[6] Although the Complaint uses the plural "meetings," it seems to describe only one meeting. J. App'x at 161 ¶ 67. Drawing all reasonable inferences in the NRA's favor, we conclude that there were multiple meetings held on or about February 27, 2018.

desire to leverage [her] powers to combat the availability of firearms." J. App'x at 161 ¶ 67. She explained the basis for her belief that Lloyd's was violating several provisions of New York insurance law. *Id.* at 144 ¶ 21 (stating that Vullo "discussed an array of technical regulatory infractions plaguing the affinity-insurance marketplace"). She then explained how Lloyd's could come into compliance and "avoid liability" for its regulatory infractions, *id.* at 162 ¶ 69, including by no longer "providing insurance to gun groups" like the NRA, *id.* at 144 ¶ 21. Vullo also sought Lloyd's aid in "DFS's campaign against gun groups." *Id.* at 162-63 ¶ 69.[7]

D. The Guidance Letters and Press Release

On April 19, 2018 – approximately two months after the Parkland shooting and six months after DFS opened its investigation into the NRA-endorsed insurance programs – Vullo weighed in publicly on the issue of gun violence. She issued a pair of guidance letters entitled "Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations"; one was addressed to DFS-regulated insurance entities and the other to DFS-regulated financial

[7] The Complaint is replete with conclusory allegations that Vullo's statements and actions were "threatening" and "coercive." *See*, *e.g.*, J. App'x at 170 ¶ 92. As we discuss below, what Vullo did and said are factual assertions; whether the actions were "threatening" and "coercive" in a First Amendment violation sense is a conclusion. We are free to consider whether that conclusion is plausible in light of the supporting factual assertions. *See Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009).

institutions (the "Guidance Letters"). J. App'x at 182-87. The Guidance Letters referenced the Parkland shooting and other mass shootings and condemned the increasing "tragic devastation caused by gun violence" as a "public safety and health issue." *Id.* at 183. The Guidance Letters also advised that these tragedies had resulted in strong social backlash against the NRA and similar organizations and predicted that the backlash would increase after the Parkland shooting.

Citing the changing public sentiment and views as to corporate social responsibility, the Guidance Letters encouraged DFS-regulated entities to "continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations, if any, as well as continued assessment of compliance with their own codes of social responsibility." *Id.* at 183-84, 186-87. The Guidance Letters did not refer to any ongoing investigations or enforcement actions, such as those regarding Carry Guard or its related programs.

The same day, Cuomo issued a press statement announcing that he had directed DFS to "urge insurers and bankers statewide to determine whether any relationship they may have with the NRA or similar organizations sends the wrong message to their clients and their communities who often look to them for guidance and support." *Id.* at 180-81 (the "Press Release"). Vullo was quoted in the Press Release as stating that "business can lead the way and bring about the kind of positive social change needed to minimize the chance that we will witness more of these senseless tragedies," and

urging "all insurance companies and banks doing business in New York to join the companies that have already discontinued their arrangements with the NRA, and to take prompt actions to manage these risks and promote public health and safety." *Id.* at 181.

E. The Consent Decrees

In May 2018, Lockton and Chubb entered into consent decrees with DFS. On May 2 and 7, 2018, DFS issued press releases explaining the content of the Lockton and Chubb consent decrees, respectively, its investigation into Carry Guard, and the relevant insurance law violations. Lloyd's entered into a consent decree with DFS a few months later in December 2018 (together with the Lockton and Chubb consent decrees, the "Consent Decrees").

In the Consent Decrees, the three entities agreed that some NRA-endorsed insurance programs they offered violated New York insurance law, they would no longer provide those or other illegal insurance programs to the NRA or New York residents, and they would pay fines.[8] The Consent Decrees also imposed numerous prohibitions on the entities' abilities to

[8] Lockton agreed to pay a $7,000,000 fine. Chubb agreed to pay a $1,300,000 fine. Lloyd's agreed to pay a $5,000,000 fine. All three entities agreed to cancel and no longer offer several NRA insurance programs that violated New York insurance law, and not to enter into any agreement or program with the NRA to underwrite or participate in any affinity-type insurance program involving any line of insurance coverage to New York residents or entities.

engage in certain insurance programs and required Chubb and Lloyd's to do "reasonable due diligence" to ensure that any entity they do business with in the future "is acting in compliance with the Insurance Law." *Id.* at 216 (Chubb Consent Decree), 236 (Lloyd's Consent Decree).

Notably, each Consent Decree expressly allowed the entities to continue to do business with the NRA. The Lockton Consent Decree provided that "Lockton may assist the NRA in procuring insurance for the NRA's own corporate operations." *Id.* at 201 ¶ 43. The Chubb Consent Decree provided that "the NRA may itself purchase insurance from Chubb for the sole purpose of obtaining insurance for the NRA's own corporate operations." *Id.* at 216 ¶ 22. And the Lloyd's Consent Decree provided that "the NRA may itself purchase insurance from [Lloyd's] for the sole purpose of obtaining insurance for the NRA's own corporate operations." *Id.* at 236 ¶ 20.

F. The Market Reaction

After the Parkland shooting, "multiple financial institutions" severed ties or decided not to do business with the NRA. *Id.* at 136.

For instance, the NRA received a call from Lockton's chairman on February 25, 2018, eleven days after the Parkland shooting, but months before the issuance of the Guidance Letters, Press Release, and Consent Decrees, and days before Vullo met with the Lloyd's executives. On the call, the chairman stated that Lockton

privately wished to do business with the NRA but had to "drop" the NRA for fear of losing its license to do business in New York. *Id.* at 152 ¶ 42. The next day, Lockton publicly tweeted that it would discontinue providing brokerage services for all NRA-endorsed insurance programs.

About two weeks after the Parkland shooting, but again before any of Vullo's relevant public statements, the NRA's corporate insurance carrier withdrew from renewal negotiations and stated that it was "unwilling to renew coverage at any price." *Id.* at 152 ¶ 44 (emphasis omitted). After the carrier's withdrawal, the NRA "encountered serious difficulties obtaining corporate insurance coverage to replace" the coverage it lost. *Id.* at 167 ¶ 81. "Multiple banks" also withdrew their bids from the NRA's Request for Proposal process in the spring of 2018. *Id.* at 167 ¶ 82.

Additionally, the NRA cites a blog post and a magazine article for examples of general market reaction to the Guidance Letters and Press Release. It first refers to a blog post published by *FinRegRag* on April 22, 2018. The blog post opined that the Press Release "could easily be construed as a thinly veiled threat" and "could also be seen as an attempt to suppress political speech that some New York policy makers disagree with." Brian Knight, *Is New York Using Bank Regulation to Suppress Speech?*, FinRegRag (Apr. 22, 2018), https://finregrag.com/is-new-york-using-bank-regulation-to-suppress-speech-ac61a7cb3bf. The post noted that although Vullo's statement did not indicate that DFS-regulated entities may face adverse

regulatory action for failing to cut ties with the NRA, "it [didn't] rule out the possibility either." *Id*.

Next, the NRA refers to a magazine article published by *American Banker* on April 26, 2018. The article reported on the Guidance Letters and surveyed industry reactions:

> The guidance appeared somewhat benign, calling on state-chartered banks and other financial services firms to rethink ties they have with the National Rifle Association and other firearms-industry groups in the wake of the mass shootings. The regulator encouraged banks to weigh reputational risk and other corporate responsibility factors in assessing their relationships.
>
> But bankers say such regulatory guidelines are frustratingly vague, and can effectively compel institutions to cease catering to legal businesses.

Neil Haggerty, *Gun Issue Is a Lose-Lose for Banks (Whatever Their Stance)*, Am. Banker (Apr. 26, 2018, 1:11 PM), https://www.americanbanker.com/news/gun-issue-is-a-lose-lose-for-banks-whatever-their-stance. A senior consulting associate at Capital Performance Group was quoted in the article as saying the following: "Banks increasingly must consider political issues as part of their risk management decision-making process," which requires "more proactive and broader considerations of reputation risk as part of risk models and calculations." *Id.* On the other hand, an anonymous banker from upstate New York was quoted as

saying the Guidance Letters "felt somewhat politically motivated" and "[i]t's hard to know what the rules are if I don't know what the rules are." *Id.*

On May 9, 2018, Lloyd's publicly announced its decision to terminate its insurance-related relationship with the NRA. Two days later, the NRA brought this suit.

II. The Proceedings Below

This case comes before us on interlocutory appeal after extensive proceedings spanning more than four years in the lower court. The NRA filed three complaints and Vullo filed four motions to dismiss. We discuss only the proceedings necessary for an understanding of our holding.

The district court issued its decision and order on March 15, 2021, dismissing all claims against Cuomo, Lacewell, and DFS, as well as the selective enforcement claim against Vullo. The district court declined, however, to dismiss two First Amendment claims against Vullo. The first claim alleges that Vullo established an unconstitutional implicit censorship regime in an effort to chill the NRA's protected speech and the second claim alleges that Vullo unconstitutionally retaliated against the NRA for its protected speech. The district court first held that the NRA sufficiently pleaded First Amendment violations. It then concluded that Vullo was not entitled to qualified immunity at the motion-to-dismiss stage, even though it was "inclined to agree with Ms. Vullo that there is no case clearly

establishing that otherwise protected public statements transform into an unlawful threat merely because there is an ongoing, and unrelated, regulatory investigation." Special App'x at 25. The court explained that:

> a question of material fact exists as to whether Ms. Vullo explicitly threatened Lloyd's with DFS enforcement if the entity did not disassociate with the NRA. . . . Further, because Ms. Vullo's alleged implied threats to Lloyd's and promises of favorable treatment if Lloyd's disassociated with the NRA could be construed as acts of bad faith in enforcing the Insurance Law in New York, a question of material fact exists as to whether she is entitled to qualified immunity under New York law.

Id. at 27.

This appeal followed.

DISCUSSION

Vullo contends that she is protected by qualified immunity and thus she asks this Court to reverse the district court's order to the extent it denied her motion to dismiss. The NRA disagrees and argues in addition that this Court lacks jurisdiction to hear this interlocutory appeal. We conclude that, first, we have jurisdiction to hear the appeal and, second, Vullo is entitled to qualified immunity. Accordingly, we reverse the district

court's denial of Vullo's motion to dismiss and remand for dismissal of the remaining claims against her.

I. Appellate Jurisdiction

The NRA asks this Court to dismiss Vullo's appeal for lack of jurisdiction, contending the district court's decision turned only on questions of fact and Vullo disputes the facts as alleged.[9]

Generally, a district court's denial of a motion to dismiss is not a "final decision" under 28 U.S.C. § 1291. *Drimal v. Tai*, 786 F.3d 219, 223 (2d Cir. 2015). But qualified immunity is a defense to litigation rather than a mere defense to liability; it is lost if a case is erroneously permitted to go to trial. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *see also Wood v. Moss*, 572 U.S. 744, 755 n.4 (2014) (noting that the Supreme Court has repeatedly stressed the importance of deciding immunity questions at the earliest possible stage of litigation). Accordingly, we may review the denial of a motion to dismiss based on qualified immunity, on an

[9] The NRA also complains that Vullo denies meeting privately with the Lloyd's executives in February 2018, contradicting the Complaint and thus precluding interlocutory appeal. But Vullo makes clear that to the extent she asserts "the allegations lodged against her by the NRA are false," she does so "not because she fails to understand or accept the procedural posture in which this case rests" but "to protect her hard-earned professional and personal reputation and as a matter of integrity." Reply. Br. at 7 n.5. We do not consider these statements in deciding the legal issues before us on appeal.

interlocutory basis, to the extent it turns on issues of law. *See Salim v. Proulx*, 93 F.3d 86, 89 (2d Cir. 1996).

If a district court's decision turns on questions of evidence sufficiency alone (*i.e.*, which alleged facts a party may, or may not, be able to prove at trial), it is not immediately appealable. *Id.* But a decision is not insulated from review simply because the district court declared that genuine issues of fact exist. *Royal Crown Day Care LLC v. Dep't of Health & Mental Hygiene*, 746 F.3d 538, 542 (2d Cir. 2014). "Rather, where a district court denies a defendant qualified immunity, there is appellate jurisdiction over that defendant's interlocutory appeal if the defendant contests the existence of a dispute or the materiality as a matter of law, or contends that he is entitled to qualified immunity even under the plaintiff's version of the facts." *Id*. (cleaned up).

Here, Vullo certainly contests the existence of material issues of fact and contends as well that she is entitled to qualified immunity even under the NRA's version of the facts. At a minimum, we have jurisdiction to determine whether she is right.

Indeed, where a defendant accepts the facts as alleged for purposes of the appeal (thereby removing any issues of fact), we may review the legal issues on interlocutory appeal. *Id.*; *see also Soto v. Gaudett*, 862 F.3d 148, 158 (2d Cir. 2017). We have recognized the following as "strictly legal" questions reviewable on interlocutory appeal: (1) whether the plaintiff sufficiently pleaded the violation of a constitutional right and (2)

whether, at the time of the alleged violation, the defendant's actions, as alleged by the plaintiff, violated clearly established law. *Tellier v. Fields*, 280 F.3d 69, 78-79 (2d Cir. 2000). Here, the district court concluded that "a question of material fact exist[ed] as to whether Ms. Vullo explicitly threatened Lloyd's with DFS enforcement if the entity did not disassociate with the NRA," Special App'x at 27, but Vullo has made clear in her briefs on appeal that she accepts the well-pleaded facts of the Complaint for purposes of the appeal. While she first argues that the Complaint alleges only conclusions and characterizations, which she need not accept as true, she assumes in the alternative that the Complaint alleges that she met with the Lloyd's executives and offered leniency in exchange for help advancing her policy goals and incorporates that allegation into her merits argument. Moreover, she does not dispute what she said in the Guidance Letters, the Press Release, or the Consent Decrees, or that she oversaw the investigation; the public record captures her words and actions in those respects. She thus accepts the facts as alleged, and we may consider her qualified immunity defense based on these assumed facts. Hence, we have jurisdiction over this appeal, and we turn to the merits.

II. The Merits

We review the denial of a motion to dismiss based on qualified immunity *de novo*. *Ganek v. Leibowitz*, 874 F.3d 73, 80 (2d Cir. 2017).

A. Applicable Law

1. Pleading Standards

To sufficiently plead a constitutional violation, a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see Iqbal*, 556 U.S. at 678. We accept as true factual allegations but not conclusions, such as statements concerning a defendant's state of mind. *Iqbal*, 556 U.S. at 681 ("To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. . . . It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."); *see also Whiteside v. Hover-Davis, Inc.*, 995 F.3d 315, 321 (2d Cir. 2021).[10]

To determine whether a claim is plausible, we must separate the complaint's factual allegations from its conclusions and then determine whether the remaining well-pleaded factual allegations plausibly allege entitlement to relief. *Whiteside*, 995 F.3d at 321. This analysis is "context specific, requiring the reviewing court to draw on its judicial experience and

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[10] For further discussion of this issue, see Howard M. Erichson, *What's the Difference Between a Conclusion and a Fact?*, 41 Cardozo L. Rev. 899, 904 (2020) ("[*Twombly* and *Iqbal*] relied on a distinction between factual *conclusions* (whether the *Twombly* defendants agreed not to compete, whether Ashcroft and Mueller intended to discriminate) and factual *supporting allegations* (what the telecommunications companies said and did, what Ashcroft and Mueller said and did).").

common sense." *Iqbal*, 556 U.S. at 663-64; *accord Lynch v. City of New York*, 952 F.3d 67, 74 (2d Cir. 2020). A claim is plausibly alleged "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. But where the facts do not permit us to "infer more than the mere possibility of misconduct," the complaint has not plausibly alleged a claim. *Id.* at 679.

2. Qualified Immunity

Qualified immunity shields government officials performing discretionary functions from suits for money damages unless their conduct violates clearly established law of which a reasonable official would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). It gives government officials the breathing room to make reasonable, even if mistaken, judgments and protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). It applies unless (1) the plaintiff sufficiently pleaded a constitutional violation and (2) the law the official allegedly violated was clearly established and apparent to a reasonable official at the time of the alleged conduct. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011); *see also Iqbal*, 556 U.S. at 673 ("[W]hether a particular complaint sufficiently alleges a clearly established violation of law cannot be decided in isolation from the facts pleaded."). Courts have discretion to decide which of the two prongs to address first, *Pearson*, 555 U.S. at 236-37, but if the complaint

fails to sufficiently plead the violation of a constitutional right, the second question is moot, *X-Men Sec., Inc. v. Pataki*, 196 F.3d 56, 66 (2d Cir. 1999).[11]

Although qualified immunity defenses are often decided on motions for summary judgment, in appropriate circumstances a district court may address qualified immunity at the pleadings stage. *Drimal*, 786 F.3d at 225.

3. The First Amendment

The NRA's First Amendment claims turn on whether Vullo's statements at the Lloyd's meetings and in the Guidance Letters, Press Release, and Consent Decrees were "implied threats to employ coercive state power to stifle protected speech." *Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983); *see also Zieper*, 474 F.3d at 65 (applying *Hammerhead* to censorship claim); *Dorsett v. County of Nassau*, 732

[11] The district court's qualified immunity analysis was incomplete in this respect. Vullo is entitled to qualified immunity unless the NRA plausibly alleged a First Amendment violation *and* "it would . . . have been clear to a reasonable officer in [her] position that [her] conduct was unlawful." *Zieper*, 474 F.3d at 68. The district court held that issues of fact precluded dismissal, but it did not discuss whether, even if the Complaint stated a First Amendment cause of action, the law was clearly established such that a reasonable officer would have known she was violating the law.

F.3d 157, 160 (2d Cir. 2013) (applying similar standard to retaliation claim).[12]

Two sets of free speech rights are implicated: those of private individuals and entities and those of government officials. With respect to the latter, the First Amendment does not impose a viewpoint-neutrality requirement on the government's own speech; a government official has the right to speak for herself (and her agency) and to select the views she wishes to express. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005). Under the government speech doctrine, public officials are generally free to favor certain views over others when they speak. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207-08 (2015) ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says."); *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 34 (2d Cir. 2018) ("When it acts as a speaker, the government is entitled to favor certain views over others.").

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[12] Two aspects of the NRA's speech are arguably at issue here: (1) the NRA's long-standing gun promotion advocacy and (2) its Carry Guard program and related business associations. The district court assumed without discussing that the protected speech at issue is the NRA's gun promotion advocacy. Of course, such speech is protected by the First Amendment. The Carry Guard program, however, is not, to the extent it violated the law. As a result, the NRA can sufficiently plead its claims only if the Complaint contains enough facts to plausibly allege that Vullo's actions were taken in retaliation for, or in an effort to chill, its gun promotion advocacy.

A viewpoint-neutrality requirement is antithetical to a healthy representative democracy, and when a government official embarks on a course of action, she may well embrace one viewpoint and reject others. *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017). The First Amendment does not forbid her from speaking about her preferred course of action; rather, it gives her the freedom to advocate for it. *Id.* Indeed, both parties here agree that Vullo was entitled to advocate for her political views – to condemn gun violence and to urge DFS-regulated entities to consider what they could do to reduce both gun violence and the reputational risks of doing business with gun promotion groups.

Nevertheless, in certain circumstances, some government speech may infringe on private individuals' free speech rights. *See Hammerhead*, 707 F.2d at 39; *Zieper*, 474 F.3d at 65 ("It is well-established that First Amendment rights may be violated by the chilling effect of governmental action that falls short of a direct prohibition against speech." (internal quotation marks omitted)). Government officials may not engage in unjustified threats or coercion to stifle speech. *Hammerhead*, 707 F.2d at 39. Accordingly, although government officials are free to advocate for (or against) certain viewpoints, they may not encourage suppression of protected speech in a manner that "can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request." *Id*.

"In determining whether a particular request to suppress speech is constitutional, what matters is the

distinction between attempts to convince and attempts to coerce." *Zieper*, 474 F.3d at 66 (internal quotation marks omitted). We have considered the following factors when distinguishing between attempts to convince and attempts to coerce: (1) word choice and tone, *id.*; (2) the existence of regulatory authority, *Okwedy*, 333 F.3d at 343; (3) whether the speech was perceived as a threat, *Rattner v. Netburn*, 930 F.2d 204, 210 (2d Cir. 1991); and, perhaps most importantly, (4) whether the speech refers to adverse consequences, *Hammerhead*, 707 F.2d at 39. No one factor is dispositive. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). "[U]nder certain circumstances, oral or written statements made by public officials will require courts to draw fine lines between permissible expressions of personal opinion and implied threats to employ coercive state power to stifle protected speech." *Hammerhead*, 707 F.2d at 39.

As for qualified immunity from these claims, the question whether an official's actions violated clearly established law must be viewed in the light of the specific context of the case, not as a broad general proposition. *Zieper*, 474 F.3d at 67. Indeed, "the fact that the general proposition that the First Amendment prohibits 'implied threats to employ coercive state power to stifle protected speech' is well-established does not end our inquiry." *Id.* (quoting *Hammerhead*, 707 F.2d at 39). Rather, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). While

the exact official action need not have been previously held unlawful, its unlawfulness must be apparent in light of pre-existing case law. *Id.*

B. Application

First, we consider whether the NRA sufficiently pleaded a First Amendment violation. Second, we consider whether, assuming it did, the law was clearly established such that the violation would have been apparent to a reasonable official at the time.

1. Did the NRA Sufficiently Plead a First Amendment Claim?

In asserting a violation of its First Amendment rights, the NRA relies principally on Vullo's actions with respect to and statements in the Guidance Letters, Press Release, Consent Decrees, and Lloyd's meetings. We discuss first the Guidance Letters and Press Release and second the Consent Decrees and Lloyd's meetings.

a. The Guidance Letters and Press Release

The Complaint alleges that Vullo's statements in the Guidance Letters constituted "threats . . . of adverse action if institutions failed to support Defendants' efforts to stifle the NRA's speech and to retaliate against the NRA based on its viewpoint." J. App'x at 154 ¶ 48. It alleges that the Press Release "threatened"

regulated entities with "costly investigations, increased regulatory scrutiny and penalties" if they did not "discontinue[] . . . their arrangements with the NRA." *Id*. at 144 ¶ 21 & n.16. And it alleges that the Guidance Letters and actions of Vullo (and Cuomo) were intended to and did "coerce insurance agencies, insurers, and banks into terminating business relationships with the NRA." *Id*. at 155 ¶ 52.

We conclude that these allegations fail to plausibly allege entitlement to relief. First, whether Vullo "threatened" or "coerced" entities in an unconstitutional sense are conclusions and characterizations that must be supported by factual allegations as to what she said and did. *Whiteside*, 995 F.3d at 321 ("[A] court should not accept as true allegations that amount to mere legal conclusions." (internal quotation marks omitted)). Second, when the Complaint's factual allegations are separated from its conclusions and characterizations, *see Iqbal*, 556 U.S. at 679, it is apparent that the Complaint fails to plausibly allege that Vullo engaged in unconstitutional threatening or coercive conduct. *See id.* at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

Vullo's words in the Guidance Letters and Press Release speak for themselves, and they cannot reasonably be construed as being unconstitutionally threatening or coercive. For example, in the Guidance Letters, Vullo referred to the "devastation caused by gun violence" as "tragic" and "regrettabl[e]," and called it "a public safety and health issue that should no

longer be tolerated by the public." J. App'x at 183. She urged DFS-regulated entities "to continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations, if any, as well as continued assessment of compliance with their own codes of social responsibility." *Id.* at 184. And in the Press Release, she stated:

> Corporations are demonstrating that business can lead the way and bring about the kind of positive social change needed to minimize the chance that we will witness more of these senseless tragedies. DFS urges all insurance companies and banks doing business in New York to join the companies that have already discontinued their arrangements with the NRA, and to take prompt actions to manage these risks and promote public health and safety.

Id. at 181.

We conclude, as a matter of law, that these statements do not cross the line between an attempt to convince and an attempt to coerce. *See Zieper*, 474 F.3d at 66; *see also Bantam Books*, 372 U.S. at 67. Rather, Vullo's statements in the Guidance Letters and Press Release are clear examples of permissible government speech. *See*, *e.g.*, *Walker*, 576 U.S. at 208; *Wandering Dago, Inc.*, 879 F.3d at 34. She plainly favored gun control over gun promotion and she sought to convince DFS-regulated entities to sever business relationships with gun promotion groups. Although she did have

regulatory authority over the target audience, and even assuming some may have perceived the remarks as threatening, the Guidance Letters and Press Release were written in an even-handed, nonthreatening tone and employed words intended to persuade rather than intimidate. They did not refer to any pending investigations or possible regulatory action; the only "adverse consequences" alluded to were the "risks, including reputational risks . . . *if any,*" of continuing to do business with gun promotion groups amid growing public concern over gun violence and the "social backlash" against "organizations that promote guns that lead to senseless violence." J. App'x at 183-84, 186-87 (emphasis added). And those consequences were mentioned only in the context of "encourag[ing]" businesses to evaluate risk. *Id.* at 184, 187. The statements did not "intimat[e] that some form of punishment or adverse regulatory action [would] follow the failure to accede to the [] request" to discontinue arrangements with the NRA and other gun promotion organizations. *Hammerhead*, 707 F.2d at 39.

The NRA argues on appeal that "[t]he Guidance Letters are suffused with political concerns far afield from DFS's mandate, urging banks and insurers to heed 'the voices of the passionate, courageous, and articulate young people' speaking out in favor of gun control." Appellee's Br. at 11 (quoting the Guidance Letters). In our view, however, it was reasonable for Vullo to speak out about the gun control controversy and its possible impact on DFS-regulated entities. The general backlash against gun promotion groups and

businesses that associated with them was intense after the Parkland shooting. It continues today.[13] Such a backlash could (and likely does) directly affect the New York financial markets; as research shows, a business's response to social issues can directly affect its financial stability in this age of enhanced corporate social responsibility.[14] As Superintendent of DFS, Vullo was charged with overseeing insurance entities, banks, and other financial institutions in New York, and she surely had the right to raise these concerns to protect DFS-regulated entities and New York residents from financial harm and to preserve stability in the state's financial system.

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[13] *See* Michael Martin, *Former Gun Industry Exec Speaks Out Against NRA's Role in Mass Shootings*, NPR (May 28, 2022, 5:19 PM), https://www.npr.org/2022/05/28/1101955074/former-gun-industry-exec-speaks-out-against-nras-role-in-mass-shootings.

[14] *See* Lily Zheng, *We're Entering the Age of Corporate Social Justice*, Harv. Bus. Rev. (June 15, 2020), https://hbr.org/2020/06/were-entering-the-age-of-corporate-social-justice (explaining that research has shown that companies that have effective corporate social responsibility programs are more profitable than those that do not). Indeed, according to a study published in 2017 – less than one year before the Parkland shooting – seven out of ten Americans believed companies had an obligation to take action to address key social and environmental issues, even if those issues were not relevant to everyday business operations. *See Americans Willing to Buy or Boycott Companies Based on Corporate Values, According to New Research by Cone Communications*, Cone (May 17, 2017), https://conecomm.com/2017-5-15-americans-willing-to-buy-or-boycott-companies-based-on-corporate-values-according-to-new-research-by-cone-communications/.

We conclude, with respect to the Guidance Letters and Press Release, that the Complaint falls short of plausibly alleging unconstitutional threats or coercion.

b. The Consent Decrees and Lloyd's Meetings

Vullo's statements at the Lloyd's meetings present a closer call. The Complaint alleges that during the meetings Vullo "discussed an array of technical regulatory infractions plaguing the affinity-insurance marketplace" but "made it clear, however, that DFS was less interested in pursuing the infractions of which she spoke, so long as Lloyd's ceased providing insurance to gun groups, especially the NRA." J. App'x at 144. But even putting aside the lack of precision as to what Vullo actually said to make her message "clear," reviewing the statements in context, as we must, *see Iqbal*, 556 U.S. at 663-64, the allegations do not plausibly amount to an unconstitutional threat or coercion to chill the NRA's free speech.

The "context" here was an investigation, commenced months before the meetings, that was triggered by a referral from the DA's Office. DFS had begun an investigation into Carry Guard and related programs in October 2017. The investigation revealed that Lockton, Chubb, and Lloyd's were selling illegal insurance policies – programs created and endorsed by the NRA. The policies insured New York residents for litigation defense costs resulting from intentional, reckless, and criminally negligent acts with a firearm

that resulted in another person's injury or death. This coverage violated New York law and public policy and resulted in three substantial Consent Decrees, whereby the companies agreed to pay a total of more than $13 million in fines and to discontinue the programs. Again, the Consent Decrees speak for themselves – they explained the violations of law and, contrary to the NRA's assertions, did not require the companies to sever ties with the NRA. Rather, they explicitly permitted the companies to continue to do business with the NRA, assuming of course the programs did not violate New York law.

The NRA nonetheless argues that the investigation renders Vullo's other statements threatening. In other words, it argues that even though Vullo did not explicitly threaten adverse regulatory action, the fact that she previously began investigating entities for insurance law violations should render her nonthreatening government speech threatening. We are not persuaded. To the contrary, the investigation explains the reasonableness of Vullo's actions.

To the extent Vullo offered Lloyd's leniency in the course of negotiating a resolution of the apparent insurance law violations, context shows that she was merely carrying out her regulatory responsibilities. Even with all reasonable inferences drawn in the NRA's favor, it is apparent Vullo did not coerce Lloyd's (or the other entities in question) into severing ties with the NRA; indeed, the consent decrees explicitly provided otherwise. Moreover, the Lloyd's Consent Decree was no more severe than that of Chubb or

Lockton; in fact, Lloyd's was subject to $2 million *less* in fines than Lockton. And the Complaint alleges no facts to support the conclusion that Chubb or Lockton were coerced into settling with DFS. Rather, the well-pleaded facts in the Complaint demonstrate that the entities – sophisticated companies represented by experienced counsel – admitted wrongdoing based on their actual insurance law violations and that Vullo was motivated by her duty to address those violations.

Twombly provides guidance here. There, the Supreme Court held that allegations of parallel business conduct and a bare assertion of conspiracy were insufficient to state an antitrust conspiracy claim. 550 U.S. at 557-66. The Court reasoned that the defendants' behaviors could be explained by lawful economic incentives and concluded that there was "no reason to infer that the companies had agreed among themselves to do what was only natural anyway." *Id.* at 566 ("[W]e agree with the District Court that nothing in the complaint intimates that the resistance to the upstarts was anything more than the natural, unilateral reaction of each [defendant-company] intent on keeping its regional dominance.").

Here, in light of the serious insurance law violations, it was only natural for Vullo to take steps – including investigating, negotiating, and resolving apparent violations – to enforce the law. Her actions were plainly reasonable. The well-pleaded allegations of the Complaint show that she was simply executing her duties as DFS Superintendent and engaging in legitimate enforcement action. All in all, the Complaint

fails to plausibly allege that Vullo unconstitutionally threatened or coerced Lloyd's or the other entities to stifle the NRA's speech.

2. Was the Law Clearly Established?

Finally, even assuming the NRA sufficiently pleaded that Vullo engaged in unconstitutionally threatening or coercive conduct, we conclude that Vullo is nonetheless entitled to qualified immunity because the law was not clearly established and any First Amendment violation would not have been apparent to a reasonable official at the time.

While it was clearly established, as a general matter, that "the First Amendment prohibits implied threats to employ coercive state power to stifle protected speech," *Zieper*, 474 F.3d at 67 (cleaned up), the contours of that right were not so "sufficiently clear" that a reasonable official in the circumstances here would have understood that what she was doing violated that right. *Anderson*, 483 U.S. at 640. The right alleged to have been violated "must have been 'clearly established' in a more particularized, and hence more relevant, sense." *Id*. The violation must have been apparent in light of pre-existing case law for qualified immunity to be denied. *Id*. Here, the various cases addressing the issue did not provide clear and particularized guidance but involved very different circumstances and much stronger conduct. The cases do not

clearly establish that Vullo's statements in this case were unconstitutionally threatening or coercive.[15]

The NRA has not cited, and we are not aware of, any case analogous to this one, where a government official has been held to have violated the First

[15] *See*, *e.g.*, *Bantam*, 372 U.S. at 62 n.5, 63, 66-67 (finding unconstitutional coercion where the Rhode Island Commission to Encourage Morality sent letters to book distributors citing its legislative mandate, advising that lists of "objectionable" books were being sent to Chief of Police, and warning that the Attorney General "will act" in case of noncompliance); *Okwedy*, 333 F.3d at 344 (holding that a minister who posted a controversial message on a billboard stated a First Amendment retaliation claim where the Staten Island Borough President wrote a letter to the billboard company invoking his official authority, advising that he was aware that the company "derives substantial economic benefits" from their billboards, and instructing the company to contact his "legal counsel and Chair of [his] Anti-Bias Task Force"); *X-Men Sec.*, 196 F.3d at 68 (holding that legislators were protected by qualified immunity from First Amendment claims where the legislators asked government agencies to investigate a private security company, questioned the company's eligibility for an award of a publicly-funded contract, and advocated that it not be retained to provide services to a publicly financed housing complex); *Rattner*, 930 F.2d at 205 (holding that a businessman who wrote a controversial article about a village administrator stated a First Amendment claim against the administrator where the administrator wrote a letter to the businessman's colleagues asking a series of targeted questions about the article, publicly announced that he had written the letter, and publicly warned that he made a list of local businesses at which he regularly shopped); *Hammerhead*, 707 F.2d at 38-39 (holding that First Amendment rights of the creators of a satirical board game were not violated where a city human resources administrator urged stores to refrain from selling the game, appealed to conscience and decency rather than punishment or adverse action, and the request "was nothing more than a well-reasoned and sincere entreaty in support of [the administrator's] own political perspective").

Amendment by making statements like those in the Guidance Letters and Press Release, which use only suggestive language and rely on the power of persuasion. In the Guidance Letters, Vullo commends DFS-regulated entities for their commitment to corporate social responsibility and for being "key players in maintaining and improving public health and safety in the communities they serve." J. App'x at 183. In the Press Release, she praises businesses for "lead[ing] the way and bring[ing] about the kind of positive social change needed to minimize the chance that we will witness more of these senseless tragedies." *Id.* at 181. Moreover, the Press Release states that the Governor was "directing the Department of Financial Services to *urge* insurers and bankers" to assess the risks of doing business with gun promotion groups, *id.* at 180 (emphasis added), not to *investigate* or take any enforcement action against them. It certainly was not clearly established at the time that any of these statements would violate the First Amendment, and indeed, as discussed above, many cases emphasized the right of government officials to speak, to take and express views, and to try to persuade. Furthermore, as the district court acknowledged, we have never held that non-threatening government speech *becomes* threatening simply because the speaker oversaw an earlier, legitimate law enforcement investigation, and we decline to do so today.

As for the Consent Decrees and Lloyd's meetings, the NRA similarly has not cited, and we are not aware of, any case like this one, where a government official

makes purportedly threatening statements urging an entity to cut ties with what is essentially its accomplice during an ongoing, legitimate investigation into serious misconduct, where the investigation results in consent decrees, and where the entities admit to violations of the law and agree to millions of dollars in fines and other significant relief. Moreover, assuming Vullo offered to go easy on Lloyd's if it severed ties with the NRA, we have never held that law enforcement officials may not offer leniency in exchange for help advancing their policy goals, especially when those policy goals aim to minimize the influence of a noncompliant business partner that has repeatedly violated the law. And again, as noted, DFS explicitly permitted Lloyd's (and the other entities) to continue doing business with the NRA.

Qualified immunity balances the need to hold public officials accountable when they exercise their power irresponsibly with the need to shield officials from harassment, distraction, and liability when they perform their duties responsibly. *Pearson*, 555 U.S. at 231. The Complaint's factual allegations show that, far from acting irresponsibly, Vullo was doing her job in good faith. She oversaw an investigation into serious violations of New York insurance law and obtained substantial relief for the residents of New York. She used her office to address policy issues of concern to the public. Even assuming her actions were unlawful, and we do not believe they were, the unlawfulness was not apparent by any means.

Accordingly, even assuming the NRA plausibly alleged a First Amendment violation, Vullo would be protected by qualified immunity in any event.[16]

CONCLUSION

For the reasons stated above, we REVERSE the district court's denial of Vullo's motion to dismiss and REMAND the case with directions for the district court to enter judgment for Vullo.

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit
[STAMP] /s/ Catherine O'Hagan Wolfe

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[16] The Complaint also cites the New York state constitution, but it combines the state law claims with the federal claims and does not assert them as independent claims. Moreover, in their briefs on appeal and to the district court, the parties do not address the state law claims at all and do not cite New York law. Accordingly, we deem the NRA's state law claims abandoned. *See Ernst Haas Studio, Inc. v. Palm Press, Inc.*, 164 F.3d 110, 112 (2d Cir. 1999) (per curiam). Moreover, even assuming the claims are not abandoned, we conclude that Vullo would be entitled to qualified immunity under New York law because, as discussed above, her actions were reasonable and there is nothing in the Complaint from which one could reasonably infer bad faith.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NATIONAL RIFLE ASSOCIATION OF AMERICA,

Plaintiff,

-against- 1:18-CV-0566

ANDREW CUOMO, both individually and in his official capacity; MARIA T. VULLO, both individually and in her official capacity; and THE NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES,

Defendants.

THOMAS J. McAVOY
Senior United States District Judge

DECISION and ORDER

(Filed Mar. 15, 2021)

I. INTRODUCTION

New York Governor Andrew Cuomo ("Gov. Cuomo"), the New York State Department of Financial Services ("DFS"), and Linda A. Lacewell, the current DFS superintendent ("Supt. Lacewell"), move to dismiss claims in the Second Amended Complaint ("SAC"). *See* Dkt. No. 210. Former DFS Superintendent Maria T. Vullo ("Ms. Vullo") appeals Magistrate Judge Hummel's decision granting Plaintiff's motion to

amend the Complaint, and moves to dismiss the claims against her in the SAC. *See* Dkt. No. 211. Plaintiff National Rifle Association ("NRA" or "Plaintiff") opposes these motions.

II. PROCEDURAL BACKGROUND

The Court assumes the parties' familiarity with the procedural history of this case and the underlying claims. It will not restate it here other than as necessary to review the pending motions.

III. DISCUSSION

a. Ms. Vullo's Motion

Rule 72 Objection

In moving for leave to amend, Plaintiff asserted to Judge Hummel that it sought to amend to replead its selective enforcement claims, substitute Supt. Lacewell for Ms. Vullo in its claim for injunctive relief, and make minor, nonsubstantive changes to the pleading. Dkt. No. 202 at 4-5. Judge Hummel found that Plaintiff did not exercise due diligence in moving to amend. *See* Dkt. No. 202. But, because mere delay absent a showing of bad faith or undue prejudice does not provide a basis to deny the right to amend, he then preceded to addressed these issues. *Id.* He declined to find that the motion to amend was brought in bad faith, and determined that Ms. Vullo had not established that she would be subjected to undo prejudice such to warrant outright denial of the motion to amend. *Id.* He then

preceded to determine whether the proposed repleaded selective enforcement claim against Ms. Vullo was futile, using a the Rule 12(b)(6) standard and the Court's prior decision on the selective enforcement claims to assess its plausibility. *Id.* He determined that the proposed pleading plausibly alleged that Ms. Vullo had knowledge of similarly situated comparators, either directly or through a "see-no-evil" policy, and that she declined to prosecute these comparators. *Id.* Thus, Judge Hummel granted the NRA's motion to replead a selective enforcement claim against Ms. Vullo in her individual capacity. *Id.*[1] He also granted Plaintiff's motion to the extent it substituted Supt. Lacewell for Ms. Vullo in Plaintiff's request for an injunction. *Id.* He denied leave to amend to the extent Plaintiff sought to replead a selective enforcement claim against Gov. Cuomo, or to newly plead such a claim against DFS. *Id.*

Ms. Vullo challenges Judge Hummel's determinations relative to whether the NRA acted in bad faith in seeking to amend, and whether Ms. Vullo will be unduly prejudiced by amendment. Whether applying the clearly erroneous or contrary to law standard of review set out in Rule 72(a), or the de novo standard of review

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[1] Count Three of the SAC brought against Ms. Vullo in her individual capacity asserts a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution pursuant to 42 U.S.C. § 1983, and a violation of Article 1, Section 11 of the New York Constitution. This claim is subject to the same substantive analysis under federal and state law, *see Selevan v. New York Thruway Auth.*, 584 F.3d 82, 88 (2d Cir. 2009), and is referred to as Plaintiff's selective enforcement claim.

set out in Rule 72(b), *see Sokol Holdings, Inc. v. BMB Munai, Inc.*, No. 05 CV 3749 KMW DCF, 2009 WL 3467756, at *3-*4 (S.D.N.Y. Oct. 28, 2009),[2] the Court finds no error in Judge Hummel's assessment of bad faith and undue prejudice. Ms. Vullo does not challenge under Rule 72 Judge Hummel's determination that the selective enforcement claim against her was non-frivolous, but rather challenges the legal viability of that claim under Rule 12(b)(6). Because the Court finds, as addressed below, that Ms. Vullo is entitled to immunity on the selective enforcement claim in the SAC, it need not address her arguments directed to the plausibility of the factual allegations supporting this claim.

Rule 12(b)(6) Motion

On the Rule 12(b)(6) motion, Ms. Vullo argues that she is entitled to absolute and qualified immunity on the selective enforcement, and qualified immunity on the First Amendment claim. The Court starts with the arguments addressed to the selective enforcement claim.

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[2] ("[S]ome uncertainty and arguable differences of opinion persist in this Circuit as to the proper standard of review of a Magistrate Judge's ruling denying a motion to amend." In light of this uncertainty, "[s]ome courts have . . . considered a denial of a motion to amend to be a dispositive decision, subject to a de novo standard of review.") (internal quotation marks and citations omitted)

Selective Enforcement Claim

In the selective enforcement claim, Plaintiff asserts that DFS received information from the New York County District Attorney's Office that the NRA was offering an affinity insurance program known as Carry Guard that was illegal under New York Insurance Law ("Insurance Law").[3] *See* SAC, Dkt. No. 203, ¶¶ 34-35. The District Attorney's Office had received its information from an organization, Everytown for Gun Safety, which has an explicit political mission to oppose the NRA. *Id.* ¶ 34. The DFS investigation into the Carry Guard insurance program initially focused on insurance companies Chubb Group Holdings, Inc. and Illinois Union (together, "Chubb") and Lockton Affinity, LLC ("Lockton") for underwriting and administering this program. The DFS investigation also looked into Lloyd's of London's ("Lloyd's") involvement in the NRA's affinity insurance programs. *See* Plt. Mem. L. in Opp., Dkt. 220, at 12 ("Lockton brokered and administered, and Lloyd's underwrote, the vast majority of non-Carry Guard policies offered to NRA members and targeted by Defendants."). "Within weeks of commencing its investigation, DFS began to target insurance programs that had nothing to do with firearms, and instead provided coverage similar or identical to coverage endorsed by other New York affinity

[3] The Carry Guard program provided, among other policy coverages, (1) liability insurance to gun owners for acts of intentional wrongdoing, and (2) legal services insurance for any costs and expenses incurred in connection with a criminal proceeding resulting from acts of self-defense with a legally possessed firearm, in violation of New York Insurance Law.

organizations." SAC ¶ 36. Plaintiff asserts that "Defendants' goal, from the outset, was to disrupt any and all business arrangements between the NRA and any insurance administrator, broker, or underwriter—indeed, any financial institution." *Id.*

Chubb, Lockton, and Lloyd's entered into consent orders with DFS in which they agreed that some of the NRA insurance programs they were involved in violated New York Insurance Laws, agreed not to provide these and other insurance programs to the NRA, and agreed to pay substantial civil monetary penalties. *See* SAC ¶ 62 and Ex. E (Chubb Consent Order); *id.* ¶¶ 54-55 and Ex. D (Lockton Consent Order); *id.* ¶ 74 and Ex. I (Lloyd's Consent Order); *see also id.* ¶ 78.[4] Ms. Vullo signed the consent orders on behalf of DFS. Plaintiff contends that Chubb, Lockton, and Lloyd's "were coerced to terminate their business arrangements with the NRA and its members—including arrangements having nothing to do with the allegedly unlawful

[4] ("On January 31, 2019, almost three months after this Court had [originally] sustained the NRA's selective-enforcement claims and permitted discovery regarding them, DFS entered into a Supplemental Consent Order with Lockton that purported to admonish violations of the same statutes by Lockton's non-NRA clients, yet did not identify the clients by name or require Lockton to cease doing business with them.") (citing Ex. J, Lockton Supplemental Consent Order).

conduct cited by DFS." *Id.* ¶ 21; *see also id.* ¶ 93;[5] ¶ 102.[6] Plaintiff asserts that "DFS has not announced—even to this day—similar inquiries concerning any" other membership organizations "although their affinity programs involve most, if not all, of the practices and features referenced by DFS in its investigation of the NRA's affinity programs." *Id.* ¶ 37. Plaintiff contends that "Defendants selectively targeted the NRA because of the NRA's constitutionally protected legislative and grassroots advocacy activities. Defendants specifically intend to undermine the NRA's ability to conduct its affairs in New York—and to advance Cuomo's anti-NRA political agenda." *Id.*

Plaintiff asserts that based on the NRA's "political views and speech relating to the Second Amendment," SAC ¶ 119, Ms. Vullo "knowingly and willfully violated

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[5] ("Defendants' concerted efforts to stifle the NRA's freedom of speech caused financial institutions doing business with the NRA to end their business relationships, or explore such action, due to fear of monetary sanctions or expensive public investigations. For example, Defendants coerced and caused Lockton, Chubb, and Lloyd's to cease their participation in NRA endorsed insurance programs, regardless of whether the insurance programs met all legal qualifications under New York's Insurance Law.")

[6] ("Defendants' actions have concretely harmed the NRA by causing financial institutions doing business with the NRA to end their business relationships, or explore such action, due to fear of monetary sanctions or expensive public investigations. For example, Defendants coerced and caused Lockton, Chubb, and Lloyd's to cease their participation in NRA endorsed insurance programs in New York and elsewhere, regardless of whether the insurance programs met all legal qualifications under New York's Insurance Law.")

the NRA's equal protection rights by seeking to selectively enforce certain provisions of the Insurance Law against Lockton's affinity-insurance programs for the NRA. Meanwhile, other affinity-insurance programs that were identically (or at least similarly) marketed by Lockton, but not endorsed by 'gun promotion' organizations, have not been targeted by DFS's investigation." *Id.* ¶ 109. In this regard, the NRA asserts:

> 58. Several of the purported "violations" assessed pursuant to the Lockton Consent Order concern programs commonly engaged in by numerous additional affinity associations that do not publicly advocate for Second Amendment rights and, therefore, are not targets of Defendants' unconstitutional conduct. Several such organizations are clients of Lockton—yet the Consent Order does not compel Lockton to discontinue its purportedly unlawful conduct with respect to these clients.
>
> 59. For example:
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> • DFS claims that Lockton Affinity violated Insurance Law § 2122(a)(1) by referring to the insurer's AM Best rating. Yet, at the time this lawsuit was filed, Lockton Affinity's affinity program for the American Optometric Association through AOAExcel ("AOAExcel") touted the "backing of a carrier that is rated A+ (Superior) by A.M. Best. Similarly, Lockton Affinity currently advertises that coverage for the affinity programs designed for the Veterans of Foreign Wars ("VFW") and Moose International Inc. ("Moose")

> was through companies "rated 'Excellent' or higher by A.M. Best."
>
> • DFS claims that Lockton Affinity violated Insurance Law § 2324(a) by giving or offering to give no cost insurance to NRA members in good standing. Yet, Lockton Affinity currently made that same offer to members of both the Professional Photographers of America ("PPA") and the VFW.
>
> • DFS claims that Lockton Affinity violated Insurance Law § 2116 by compensating the NRA based on actual premiums collected. Yet, Lockton Affinity paid AOAExcel, Moose, the VFW, the PPA, and dozens of other clients in the same or similar manner.

Id. ¶¶ 58-59 (emphasis is original, footnotes omitted). As is apparent, the Insurance Law violations identified in paragraph 59 were insurance programs identified in the Lockton Consent Order that had nothing to do with firearms (which the Court refers to as the additional provisions of the Lockton Consent Order), and which purportedly similarly existed in other entities' affinity insurance programs. Plaintiff asserts that "[e]ven if such conduct does violate insurance law, DFS's selective enforcement of such offenses as to NRA-endorsed policies—but not as to other policies marketed by Lockton in an identical fashion—constitutes impermissible viewpoint discrimination and a denial of equal protection under the law." *Id.* ¶ 60.

To demonstrate Ms. Vullo's knowledge of comparator affinity programs, Plaintiff alleges that Vullo had conversations and meetings with senior officials of Lloyd's in the spring of 2018 during which she learned of comparator programs. *See Id.* ¶ 110. Plaintiff asserts that during these conversations and meetings, Ms. Vullo expressed an intention not to prosecute violations provided Lloyd's stopped providing insurance to the NRA and other gun promotion organizations. *See id.* ¶ 21;[7] ¶ 67;[8] ¶ 69.[9]

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[7] ("During the meetings [Vullo] discussed an array of technical regulatory infractions plaguing the affinity-insurance marketplace. Vullo made it clear, however, that DFS was less interested in pursuing the infractions of which she spoke, so long as Lloyd's ceased providing insurance to gun groups, especially the NRA.")

[8] ("In the aftermath of the Parkland tragedy, Vullo met with senior executives of Lloyd's and [Lloyd's United States affiliate, Lloyd's America, Inc. (LAI)], and presented Defendants' views on gun control and their desire to leverage their powers to combat the availability of firearms, including specifically by weakening the NRA.")

[9] ("During her surreptitiously held meetings with Lloyd's executives that commenced in February 2018, Vullo acknowledged the widespread regulatory issues in the excess-line marketplace. Vullo and DFS made clear that Lloyd's could avoid liability for infractions relating to other, similarly situated insurance policies, so long as it aided DFS's campaign against gun groups. Against the specter of this bold abuse of her position, Lloyd's agreed that it would instruct its syndicates to cease underwriting firearm-related policies and would scale back its NRA-related business; in exchange, DFS would focus its forthcoming affinity-insurance enforcement action solely on those syndicates which served the NRA, and ignore other syndicates writing similar policies.")

As an alternative to Ms. Vullo's direct knowledge of comparators, the SAC asserts that "Vullo should have known of similarly situated individuals at the time DFS launched its investigation and any purported lack of knowledge was due to a 'see-no-evil' policy of enforcement, which Vullo and DFS abandoned solely to further their vendetta against the NRA." SAC ¶ 111. "The 'see-no-evil' enforcement policy was confirmed by DFS's continued ignorance toward the violations of the similarly situated comparators." *Id.* The NRA further alleges that "[b]y virtue of the position held by Vullo at the time DFS launched its investigation, Vullo knew the actions taken by DFS against NRA affinity insurance programs were unprecedented. No other similarly situated programs have faced even close to the same treatment for analogous violations. However, Vullo and DFS failed to inquire about whether there were any other similarly situated affinity programs when the investigation was launched." *Id.* ¶ 112.

Absolute Immunity

"Courts have recognized two forms of immunity: absolute and qualified." *DiBlasio v. Novello*, 344 F.3d 292, 296 (2d Cir. 2003) (citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993)). "Absolute immunity gives 'public officials entrusted with sensitive tasks a protected area of discretion within which to carry out their responsibilities.' " *Mangiafico v. Blumenthal*, 471 F.3d 391, 394 (2d Cir. 2006) (quoting *Barr v. Abrams*, 810 F.2d 358, 361 (2d Cir. 1987)). " 'The presumption is that

qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties,' and hence courts are generally 'quite sparing' in their recognition of absolute immunity." *DiBlasio*, 344 F.3d at 296 (quoting *Burns v. Reed*, 500 U.S. 478, 486-87 (1991) (citations omitted)). However, "there are some officials whose special functions require a full exemption from liability." *Butz v. Economou*, 438 U.S. 478, 508 (1978). "The Supreme Court has accorded absolute immunity to a limited range of government officials whose duties are deemed, as a matter of public policy, to require that protection to enable them to function without fear of undue interference or harassment." *Mangiafico*, 471 F.3d at 394. "Absolute immunity is accorded to judges and prosecutors functioning in their official capacities and, under certain circumstances, is also extended to officials of government agencies 'performing certain functions analogous to those of a prosecutor' or a judge." *DiBlasio*, 344 F.3d at 296-97 (quoting *Butz*, 438 U.S. at 515). "In considering whether the procedures used by [an] agency are sufficiently similar to judicial process to warrant a grant of absolute immunity," the Court employs a functional approach. *Id.* at 297 (citing *Cleavinger v. Saxner*, 474 U.S. 193, 201-02 (1985), in turn citing *Harlow v. Fitzgerald*, 457 U.S. 800, 810 (1982)). Under the functional approach, the Court looks "to whether the actions taken by the official are 'functionally comparable' to that of a judge or a prosecutor." *Id.* (quoting *Butz*, 438 U.S. at 513, and citing *Imbler v. Pachtman*, 424 U.S. 409, 423 n. 20 (1976); *Young v. Selsky*, 41 F.3d 47, 51 (2d Cir. 1994)). "Government actors who seek absolute

immunity 'bear the burden of showing that public policy requires an exemption of that scope.'" *Id.* (quoting *Butz*, 438 U.S. at 506). "However, once a court determines that an official was functioning in a core judicial or prosecutorial capacity, absolute immunity applies 'however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff.'" *Id.* (quoting *Cleavinger*, 474 U.S. at 199-200 (internal quotations and citations omitted)). Further, because the focus of absolute immunity is on the function performed, once absolute immunity is established the Court does not consider allegations of ill intent or discriminatory enforcement. *See Dory v. Ryan*, 25 F.3d 81, 83 (2d Cir. 1994) ("[The Supreme Court decision in *Buckley*] indicates that absolute immunity protects a prosecutor from § 1983 liability for virtually all acts, regardless of motivation, associated with his function as an advocate. This would even include, for purposes of this case, allegedly conspiring to present false evidence at a criminal trial."); *see also Verbeek v. Teller*, 158 F. Supp. 2d 267, 282 (E.D.N.Y. 2001) (granting motion to dismiss claims against prosecutorial official because conspiracy allegation does not "negate her entitlement to absolute immunity") (citing *Dory*, 25 F.3d at 83). New York's state law absolute immunity is essentially the same as federal absolute immunity. *See Arteaga v. State*, 72 N.Y.2d 212, 216 (N.Y. 1988).[10]

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[10] In *Arteaga*, the New York Court of Appeals wrote:

> The absolute immunity for quasi-judicial discretionary actions is founded on public policy and is generally said

As a general principle, a government official "is entitled to absolute immunity when functioning as an advocate of the state in a way that is intimately associated with the judicial process." *Mangiafico*, 471 F.3d at 396 (citing *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)). By contrast, a government official "is entitled only to qualified immunity when functioning in an administrative or investigative capacity." *Id.* (citing *Mitchell v. Forsyth*, 472 U.S. 511, 520-21 (1985) (no absolute immunity for the Attorney General's exercise of his national security functions); *Buckley*, 509 U.S. at 274-76 (1993) (no absolute immunity when a

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> to reflect the value judgment that the public interest in having officials free to exercise their discretion unhampered by the fear of retaliatory lawsuits outweighs the benefits to be had from imposing liability. Not all discretionary actions, however, are accorded absolute immunity.
>
> Whether an action receives only qualified immunity [under New York law], shielding the government except when there is bad faith or the action taken is without a reasonable basis, or absolute immunity, where reasonableness or bad faith is irrelevant, requires an analysis of the functions and duties of the particular governmental official or employee whose conduct is in issue. The question depends not so much on the importance of the actor's position or its title as on the scope of the delegated discretion and whether the position entails making decisions of a judicial nature—i.e., decisions requiring the application of governing rules to particular facts, an exercise of reasoned judgment which could typically produce different acceptable results.

Arteaga v. State, 72 N.Y.2d at 216 (citations and quotations marks omitted).

prosecutor acts in administrative capacity); *Burns*, 500 U.S. at 492-95 (no absolute immunity for a prosecutor offering legal advice to the police regarding interrogation practices)).

The NRA's selective enforcement claim is premised on two actions: First, Ms. Vullo's decision to enter into the Lockton, Lloyd's and Chubb Consent Orders—and their precise terms. The NRA's purported comparators are based on violations agreed to in those Consent Orders. As Ms. Vullo asserts, were it not for those Consent Orders the NRA could not allege selective enforcement based on Ms. Vullo's conduct. Second, Ms. Vullo's alleged decision not to bring charges against the purported comparators. For reasons discussed below, these are both prosecutorial actions premised on enforcement decisions intimately associated with the judicial process.

There is not merit to Plaintiff's contention that absolute immunity does not apply because Ms. Vullo's relevant conduct was investigative in nature. As the NRA states in its brief, "the date that DFS opened its investigation into the NRA's insurance programs is irrelevant. The relevant date or dates is the date DFS took action against the NRA, or its business partners." Dkt. 220 at 15. As explained here, the NRA's selective enforcement claim is premised on two enforcement decisions. Plaintiff's argument that "[t]he NRA also alleges that Vullo violated its Equal Protection rights by selectively targeting the NRA in DFS's *investigation* of certain affinity programs, but failing to make similar inquiries into other similar membership affinity

programs," *id.* at 18 (emphasis in original), does not remove the selective enforcement claim and Ms. Vullo's enforcement decisions from absolute immunity consideration. A selective investigation claim is not asserted in the SAC, *see* SAC ¶ 109 (specifically alleging that Ms. Vullo violated the NRA's equal protection rights by selectively enforcing certain provisions of the Insurance Law against Lockton's affinity insurance programs for the NRA), and the NRA cannot amend its complaint for the fourth time through a memorandum of law.[11] Moreover, there is no merit to Plaintiff's argument that prosecutorial immunity only attaches to "the initiation of a prosecution and the presentation of

[11] The facts that the NRA cites to support its selective investigation claim, paragraphs 36 and 37 of the SAC, reference "Defendants" and "DFS's" conduct, focus, and goals, but do not mention Ms. Vullo. There is no merit to Plaintiff's argument that Ms. Vullo has supervisory liability under the standard announced in *Colon v. Coughlin*, 58 F.3d 865 (2d Cir. 1995) for DFS's conduct taken "on her watch." *See* Dkt. No. 220 at 9-11 (arguing for supervisory liability under *Colon*); *see also id.* at 9 ("Vullo cannot deny knowledge of, or escape liability for, actions undertaken by DFS on her watch."). "[T]he Second Circuit recently held that the *Colon* test was abrogated by the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed.2d 868 (2009)." *Jeanty v. City of Utica*, No. 6:16-CV-00966 (BKS/TWD), 2021 WL 149051, at *33 (N.D.N.Y. Jan. 14, 2021) (citing *Tangreti v. Bachmann*, 983 F.3d 609, 618 (2d Cir. 2020)). In *Tangreti*, the Second Circuit "clarified that 'there is no special rule for supervisory liability' and explained that 'a plaintiff must plead and prove 'that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'" *Doe v. Zucker*, No. 1:20-CV-840 (BKS/CFH), 520 F.Supp.3d 217, 260, (N.D.N.Y. 2021) (quoting *Tangreti*, 983 F.3d at 612, in turn quoting *Iqbal*, 556 U.S. at 676). Thus, Plaintiff has not adequately pled a "selective investigation" claim against Ms. Vullo.

the government's case." Prosecutorial immunity protects conduct that occurs both before and during the judicial phase. *See Burns*, 500 U.S. at 492 (immunity protects pre-indictment search warrant application during the investigative stage); *Butz*, 438 U.S. at 516 (immunity encompasses "decision to initiate" agency adjudication); *Mangiafico*, 471 F.3d at 396 (immunity encompasses "actions preliminary to the initiation of a prosecution"). The decision to reach a consented-to resolution—analogous to securing a plea bargain in a criminal proceeding—rather than "commit the state's resources, reputation, and prestige to litigation," is a prosecutorial decision. *Mangiafico*, 471 F.3d at 396; *see Knowlton v. Shaw*, 704 F.3d 1, 7-8 (1st Cir. 2013) (in an insurance enforcement proceeding, entering into consent decrees is preparatory to "the initiation of the enforcement proceeding—a proceeding that would have surely followed had no consent agreement been executed" and not "investigative"); *see also Taylor v. Kavanagh*, 640 F.2d 450, 453 (2d Cir. 1981) (a prosecutor is entitled to absolute immunity for negotiating a plea bargain in a criminal case); *Powers v. Coe*, 728 F.2d 97, 103-04 (2d Cir. 1984) ("The alleged breach of the agreement not to prosecute, while not technically a plea bargain which would render the prosecutor's immunity absolute under *Taylor v. Kavanagh*, 640 F.2d at 453, is so closely analogous to a plea bargain that we think the same principle of absolute immunity apply under the functional analysis of *Kavanagh*."). As explained below, so too is the decision not to prosecute a violation of the Insurance Law.

To determine whether the process in which the government official acts "share enough of the characteristics of the judicial process, and whether the official[] [herself was] functioning in a manner sufficiently analogous to a judge or prosecutor," the Court assesses the six non-exhaustive factors outlined in *Butz* that are characteristic of the judicial process. *DiBlasio*, 344 F.3d at 297-98 (citing *Butz*, 438 U.S. at 513; *Cleavinger*, 474 U.S. at 202) (interior quotation marks and brackets omitted). These factors are: (a) the need to assure that the individual can perform [her] functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal. *Butz*, 438 U.S. at at 512.

As Superintendent of DFS, Ms. Vullo was charged with the enforcement of the New York Financial Services Law, Banking Law, and Insurance Law. The DFS Superintendent, "in the enforcement of relevant statutes and regulations, may undertake an investigation" into activities that may constitute violations of, inter alia, the Financial Services Law, N.Y. Fin. Servs. Law § 404, and/or the Insurance Law, N.Y. Ins. Law. § 308. If a violation is found, the Superintendent is authorized to bring a statement of charges and initiate a hearing. N.Y. Ins. Law. § 2405(a); N.Y. Fin. Servs. Law §§ 305, 306. The Superintendent presents evidence of a violation of any of these laws at an administrative

hearing in which the alleged violator is given an opportunity to be heard. 23 NYCRR Part 2; N.Y. Fin. Servs. Law § 305. Where the hearing officer finds that a violation has occurred, the Superintendent may impose civil penalties and other remedies. *See* N.Y. Ins. Law §§ 2102(g), 2110, 2117(g), 2127; N.Y. Fin. Servs. Law § 408. The Superintendent's function is akin to that of a prosecutor: bringing charges, attempting to negotiate resolutions (*i.e.* the Consent Orders), and preparing for trial (DFS hearings) before an adjudicator if a negotiated resolution is not reached.

Absolute immunity protects officials "from personal liability for the performance of certain discretionary acts. Such immunity extends to prosecutors [and] to executive officers initiating administrative proceedings." *Spear v. Town of W. Hartford*, 954 F.2d 63, 66 (2d Cir. 1992) (citing *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976) and *Butz*, 438 U.S. at 515-17); *see Butz*, 438 U.S. at 516 (absolute immunity encompasses "decision to initiate or continue a proceeding subject to agency adjudication"); *Mangiafico*, 471 F.3d at 395-96 ("[A]gency officials who perform functions analogous to those of a prosecutor are entitled to absolute immunity from such liability for their participation in the decision to initiate or to continue agency proceedings.") (citing *Butz*, 438 U.S. at 512-13); *Douglas v. New York State Adirondack Park Agency*, 895 F. Supp. 2d 321, 340 (N.D.N.Y. 2012) (absolute immunity for park agency officials' initiation of an agency enforcement proceeding).

> The Supreme Court, in extending prosecutorial immunity to the executive branch, explained that
>
> > agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts. The decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. . . . The discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted if their immunity from damages arising from that decision was less than complete.

Spear, 954 F.2d at 66 (quoting *Butz*, 438 U.S. at 515). The targets of a DFS enforcement action—banks and insurance companies—are well resourced and, as Ms. Vullo argues, inclined to bring suit. Without the protection absolute immunity affords, a DFS superintendent's "discretion" in initiating "proceedings might be distorted" due to litigation for purposes of "harassment or intimidation." *Butz*, 438 U.S. at 515; *see id.* at 510-11 (The "public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up," should not be "biased with the fear of being harassed by a vicious suit for acting according to their consciences (the danger of which might easily be insinuated where powerful men are warmly engaged in a cause and thoroughly prepossessed of the justice of the

side which they espouse)."). The first *Butz* factor weighs in favor of absolute immunity with regard to Ms. Vullo's decision to initiate enforcement proceedings that resulted in the Consent Orders in issue on the selective enforcement claim.

The Second Circuit has also "consistently afforded absolute immunity to a government attorney's decision whether or not to initiate litigation on behalf of the state." *Mangiafico*, 471 F.3d at 396; *see Ying Jing Gan v. City of New York*, 996 F.2d 522, 530 (2d Cir. 1993) ("A prosecutor thus has absolute immunity in connection with the decision whether or not to commence a prosecution."). "[A]s a matter of logic, absolute immunity must . . . protect the prosecutor from damages suits based on the decision *not* to prosecute." *Schloss v. Bouse*, 876 F.2d 287, 290 (2d Cir. 1989) (emphasis in original) (citing *Dacey v. Dorsey*, 568 F.2d 275, 278 (2d Cir. 1978) (United States Attorney who chose not to seek injunction under 42 U.S.C. § 1986 to restrain alleged civil rights violation was absolutely immune from damages suit by victim), *cert. denied*, 436 U.S. 906, 98 S. Ct. 2238, 56 L. Ed.2d 405 (1978)). The Second Circuit explained in *Schloss*:

> Though not all of the concerns discussed in *Imbler* indicate a need for absolute immunity with respect to a decision not to prosecute, many of the same factors may come into play. For example, the decision not to prosecute could expose the prosecutor to a suit by the complainant asserting that the complainant was denied the equal protection of the law.

> Further, absolute protection from a damages suit for not prosecuting is warranted simply because the decision with respect to any given charge is an either-or proposition. A decision to prosecute logically eliminates the non-prosecution option, and vice versa. If the prosecutor had absolute immunity only for the decision to prosecute and not for a decision not to prosecute, his judgment could be influenced in favor of a prosecution that sound and impersonal judgment would eschew. Thus, the contours of absolute prosecutorial immunity should be drawn to avoid skewing the prosecutor's judgment in either direction, both to eliminate the appearance that personal considerations may be a factor, *see*, *e.g.*, *Imbler v. Pachtman*, 424 U.S. at 424-25, 96 S. Ct. at 992 ("[t]he public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages"), and to avoid establishing a doctrine that would "discourage prosecutors from dismissing meritless actions before trial, since only by pursuing . . . charges would the prosecutor be fully immune," *Haynesworth v. Miller*, 820 F.2d 1245, 1270 n. 200 (D.C. Cir. 1987).

Id.

These same considerations apply to Ms. Vullo's decision not to prosecute the Insurance Law violations identified in paragraph 59 of the SAC of which she was purportedly aware. Without the protection absolute immunity affords, a DFS Superintendent's discretion

in declining to initiate proceedings might be distorted due to fear of litigation, such as is the case here. Further, without absolute immunity, the Superintendent is deprived of discretion to determine whether to invest the State's resources in the prosecution of a particular matter no matter how inconsequential the matter may be in the grander scheme of enforcing the Insurance Law in New York, and no matter whether there is sufficient merit to a particular matter. As the SAC indicates, DFS learned of the additional violations in the Lockton Consent Order only after investigating whether Lockton, Chubb, and Lloyd's were involved in offering the Carry Guard program involving serious violations of the Insurance Law. Without absolute immunity protecting the Superintendent's discretion as to which violations to prosecute, the Superintendent would be placed in the position of having to prosecute every ostensible violation so as to be afforded immunity. Because absolute immunity looks at the function in question and not the motive or intent of the actor in performing that function, the first *Butz* factor also weighs in favor of absolute immunity for Ms. Vullo's decision not to institute enforcement proceedings against the various entities in New York that she was purportedly aware.

As to the second *Butz* factor, the NRA argues that "[a]lthough there are some safeguards to protect parties from unconstitutional conduct by the DFS Superintendent, the efficacy of those safeguards is diminished by other provisions of the Financial Services Law. Specifically, although a party is entitled to

notice and a hearing, the 'independence' of any hearing is severely undermined because it is held before the Superintendent or an individual directly designated by the Superintendent. Additionally, the hearing officer only has the power to suggest a course of action, while the Superintendent has the final authority to reject the recommendation and issue whatever order she desires." Dkt. No. 220, at 20 (citing N.Y. Fin. Serv. Law § 305). From this, the NRA argues that "Vullo has virtually unfettered ability to act in an unconstitutional manner without appropriate safeguards." *Id.* (citing *DiBlasio*, 344 F.3d at 299).

In *DiBlasio*, in addressing the second *Butz* factor the Second Circuit held that although some procedures of New York Public Health Law § 230 "provide some protection to physicians subjected to summary suspension proceedings, the efficacy of those procedures are seriously diminished by other features of § 230." *DiBlasio*, 344 F.3d at 298-99. After reviewing these other features of § 230, the Circuit concluded that the Department of Health Commissioner "has virtually unfettered authority to determine whether a physician's license should be summarily suspended pending resolution of misconduct charges—a process that, in this case, took eight months. The absence of meaningful safeguards against arbitrary executive action in a summary suspension proceeding weigh against extending absolute immunity" to the Commissioner and a department fraud investigator who recommended the plaintiff's suspension. *DiBlasio*, 344 F.3d at 299. In making this decision, the Circuit stated that "we find

that § 230 inadequately protects physicians from wrongful deprivation of their professional licenses, the second *Butz* factor." *Id.* at 298.

The procedures involving Insurance Law violations are much different than the procedures involving a summary suspension of a physician's license pending a hearing as examined in *DiBlasio*, and do not give the DFS Superintendent "virtually unfettered ability to act in an unconstitutional manner." Under applicable law, had Lockton, Lloyd's, or Chubb not admitted liability, each would have had the opportunity to proceed with a DFS evidentiary hearing, be represented by counsel in front of an impartial hearing officer not previously involved in the matter, present evidence, hold the state to its burden of proof, cross-examine witnesses, and dispute the hearing officer's findings, as well as appeal to the state Supreme Court. At a hearing, the hearing officer must prepare a report detailing the findings from the adversarial hearing, N.Y. Fin. Servs. Law § 305(b), and assuming the Superintendent were to make the decision disregarding the report for political reasons, as the NRA contends, the affected party could seek reversal via a state court Article 78 proceeding on the grounds of an arbitrary and capricious decision. *See*, *e.g.*, *Mordukhaev v. Daus*, 457 F. App'x 16, 21 (2d Cir. 2012) ("[T]he availability of an Article 78 proceeding to challenge any alleged deficiencies in an administrative adjudication is sufficient to satisfy due process."). As discussed below under the fifth *Butz* factor, an Article 78 proceeding following a DFS administrative proceeding could, if warranted,

vacate the liability determination and any penalty imposed. The Court finds here that the second *Butz* factor weighs in favor of immunity

The third *Butz* factor, insulation from political influence, weighs against absolute immunity because Ms. Vullo served at the will of the Governor. *See* N.Y. Fin. Serv. Law § 202(a) ("The head of [DFS], . . . shall be appointed by the governor [and] . . . shall hold office at the pleasure of the governor."); *see also DiBlasio*, 344 F.3d at 298 (if "the commissioner of health 'serves at the will of the Governor,' . . . it would be improper to characterize the commissioner as insulated from political influence").

On the fourth *Butz* factor, the importance of precedent, the NRA asserts that no provision of the Financial Services Law or the Insurance Law indicates that DFS or its Superintendent place any value on precedent when making decisions with respect to violations of the Insurance Law. Because Ms. Vullo bears the burden of establishing her entitlement to absolute immunity, and because she has not addressed this issue, the Court finds that the fourth *Butz* factor weighs against absolute immunity.

Finally, the fifth *Butz* factor directs the Court to assess the correctability of error on appeal. In arguing against this factor, the NRA cites to *DiBlasio* where the Circuit held:

> *Butz* also requires us to consider whether a wrongful summary suspension is "correctabl[e] on appeal." *Butz*, 438 U.S. at 512, 98

> S.Ct. 2894. The district court reasoned that the hearing required by § 230(10)(f) and the availability of an Article 78 proceeding provide prompt review of a summary suspension, hence weighing in favor of absolute immunity. In the context of determining whether absolute immunity is appropriate, the hearing available under § 230, while providing an avenue for review of the charges themselves, provides no meaningful review of the summary suspension because, as happened here, the commissioner is free to ignore the hearing committee's recommendation. In addition, in the context of determining whether absolute immunity is appropriate, Article 78 proceedings are generally not considered adequate avenues for "appeal." *See* [*Young v. Selsky*, 41 F.3d 47, 54 (2d Cir. 1994)].

DiBlasio, 344 F.3d at 299.

As explained above, in the DFS Insurance Law enforcement context, a hearing is held and a decision rendered before adverse consequences can be imposed. This differs substantially from the situation addressed in *DiBlasio*. Further, upon the imposition of an adverse determination, a respondent is entitled to appeal the determination through an Article 78 proceeding asking to have the adverse consequences vacated. While the Circuit said that Article 78 proceedings are generally not considered adequate avenues for appeal in the context of determining whether absolute immunity is appropriate, neither the situations in *DiBlasio* nor *Young*, the case cited by the Circuit for this proposition,

fit squarely with the situation following an adverse Insurance Law determination by the DFS Superintendent.

As indicated, *DiBlasio* involved a summary suspension before resolution of the underlying charges. If Lockton, Lloyd's, or Chubb had declined to admit liability, they would have had a full evidentiary hearing that mirrors a judicial one, with the significant due process protections described above, before any penalty or suspension could be imposed. And they would have had the right to seek to vacate an adverse decision by an Article 78 proceeding. Unlike in *DiBlasio* where an Article 78 proceeding after the fact of a summary suspension afforded the plaintiff inadequate relief, the same cannot be said of a post-hearing Article 78 proceeding.

Young is also distinguishable from the situation here. In *Young*, the Circuit held that damages, which were the only viable remedy for the due process deprivation in issue, were unavailable in an Article 78 proceeding, rendering it inadequate for appellant. *See Young*, 41 F.3d at 54.[12] The situation in *Young* is quite

[12] ("[T]he type of injury plaintiff alleged may not be adequately correctable on appeal. . . . [P]urely prospective relief on administrative appeal does not adequately cure a due process violation in a disciplinary hearing if the prisoner has already served part of his disciplinary sentence in the SHU pending administrative review. Similarly, if the administrative appeal officer compounds the violation by unreasonably affirming, a later reversal in state court will be inadequate unless it includes monetary damages. . . . [M]onetary damages are not available in [an Article 78] proceeding.") (citations omitted).

different than the situation that would arise if Lockton, Lloyd's, or Chubb had proceeded to a hearing, received an adverse determination, and appealed via an Article 78 proceeding. Unlike in *Young*, such an appeal could afford an entity relief from an unconstitutional or improper decision entered by Ms. Vullo.

The Court finds that an Article 78 proceeding provides a sufficient avenue for a party that receives an adverse decision in a DFS enforcement proceeding to correct an error on appeal. Accordingly, the Court finds that the fifth *Butz* factor weighs in favor of absolute immunity.

Weighing all of the *Butz* factors, and considering Ms. Vullo's functions that underlie the selective enforcement claim, the Court finds that she is entitled to absolute immunity on the selective enforcement claim. Accordingly, the claim, under both federal and state law, is dismissed.

First Amendment Claims[13]

Count One of the SAC alleges that "Defendants' actions—including but not limited to the issuance of

[13] Counts One and Two of the SAC assert violations of the First Amendment of the United States Constitution pursuant to 42 U.S.C. § 1983, and violations of Article 1, Section 8 of the New York Constitution. These claims are subject to the same analysis under federal and state law, *see*, *Martinez v. Sanders*, 307 F. App'x 467, 468 n.2 (2d Cir. 2008) (citing *Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26*, 638 F.2d 404 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982)), and are referred to as Plaintiff's First Amendment Claims.

the April 2018 [Guidance] Letters and the accompanying backroom exhortations, the imposition of the Consent Orders upon Chubb and Lockton, and the issuance of the Cuomo Press Release—established a 'system of informal censorship' designed to suppress the NRA's speech." SAC ¶ 90.[14] Plaintiff asserts that Defendants took these actions "with the intent to obstruct, chill, deter, and retaliate against the NRA's core political speech." *Id.* ¶ 91. Count Two alleges that these same actions by Defendants "were in response to and substantially caused by the NRA's political speech regarding the right to keep and bear arms. Defendants' actions were for the purpose of suppressing the NRA's pro-Second Amendment viewpoint. Defendants undertook such unlawful conduct with the intent to obstruct, chill, deter, and retaliate against the NRA's core political speech." *Id.* ¶ 101.

These are essentially the same claims that the Court examined in tandem in the November 6, 2018 Decision & Order, Dkt. No. 56. In doing so, the Court found that "[t]he Guidance Letters and Cuomo Press Release, read in isolation, clearly fit into the government-speech doctrine as they address matters of public importance on which New York State has a significant interest." *Id.* at 16-17. But in analyzing these claims, the Court wrote:

> "'First Amendment rights may be violated by the chilling effect of governmental action that

[14] For a more complete discussion of the April 2018 Guidance Letters and the Cuomo Press Release, reference is made to the Court's November 6, 2018 Decision & Order, Dkt. No. 56.

> falls short of a direct prohibition against speech.'" *Zieper v. Metzinger*, 474 F.3d 60, 65 (2d Cir. 2007) (quoting *Aebisher v. Ryan*, 622 F.2d 651, 655 (2d Cir. 1980)); *see also Dorsett v. Cty. of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013) ("To plead a First Amendment retaliation claim a plaintiff must show: (1) he has a right protected by the First Amendment; (2) the defendant's actions were motivated or substantially caused by his exercise of that right; and (3) the defendant's actions caused him some injury."). As applicable to the allegations in Counts One and Two, "the First Amendment prohibits government officials from encouraging the suppression of speech in a manner which 'can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request.'" *Zieper*, 474 F.3d at 65-66 (quoting *Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983)). In determining whether government statements impede upon First Amendment rights, "what matters is the 'distinction between attempts to convince and attempts to coerce.'" *Id.*, at 66 (quoting *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003)) (*per curiam*).

Id. at 18. The Court noted that the First Amendment "require[s] courts to draw fine lines between permissible expressions of personal opinion [by public officials] and implied threats to employ coercive state power to stifle protected speech." *Id.* (quoting *Hammerhead*, 707 F.2d at 39). However, after examining the totality of

the allegations, and accepting the factual allegations as true, the Court found:

> While neither the Guidance Letters nor the Cuomo Press Release specifically directs or even requests that insurance companies and financial institutions sever ties with the NRA, a plausible inference exists that a veiled threat is being conveyed. Viewed in the light most favorable to the NRA, and given DFS's mandate—"effective state regulation of the insurance industry" and the "elimination of fraud, criminal abuse and unethical conduct by, and with respect to, banking, insurance and other financial services institutions," N.Y. Fin. Servs. Law § 102(e), (k)—, the Cuomo Press Release and the Guidance Letters, when read objectively and in the context of DFS's regulatory enforcement actions against Chubb and Lockton and the backroom exhortations, could reasonably be interpreted as threats of retaliatory enforcement against regulated institutions that do not sever ties with the NRA.

Id. at 24-25.

Ms. Vullo argues that she is entitled to qualified immunity on the First Amendment claims because it was objective reasonably for her to believe her statements in the Guidance Letters and press release were lawful, and there "is no case clearly establishing that otherwise protected public statements transform into an unlawful 'threat' because there is an ongoing (and unrelated) regulatory investigation." Dkt. No. 211-1 at

31. She further maintains that at the time she made her "public statements, DFS had made no public statements about the Carry Guard investigation. Nor do the NRA's (false) allegations that Ms. Vullo coupled her public statements with 'backroom exhortations' change the analysis, because they are vague and conclusory—there is no specific allegation that Ms. Vullo directly threatened unlawful government enforcement." *Id.* She argues that "[r]easonable officials would believe it lawful to privately express the sentiments that are lawful to express publicly." *Id.* The NRA counters that qualified immunity is a fact-specific inquiry that should be undertaken after fact discovery, and that the conduct alleged by the NRA was not "objectively reasonable" but rather violated clearly established constitutional rights.

The Court is inclined to agree with Ms. Vullo that there is no case clearly establishing that otherwise protected public statements transform into an unlawful threat merely because there is an ongoing, and unrelated, regulatory investigation. *See Zieper*, 474 F.3d at 68 (granting qualified immunity against First Amendment claim because it was not "apparent to a reasonable officer that defendants' actions crossed the line between an attempt to convince and an attempt to coerce"); *see also Simon v. City of N.Y.*, 893 F.3d 83, 92 (2d Cir. 2018) ("A right is clearly established when its 'contours . . . are sufficiently clear that every reasonable official would have understood that what he is doing violates that right.' ") (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)) (alteration in original); *Gerard v.*

City of New York, No. 19-3102, ___ Fed. Appx. ___, 2021 WL 4855722, *1 (2d Cir. Feb. 10, 2021).[15] But here the Court found that, in the context of the factual allegations asserted in the Amended Complaint, it was plausible to conclude that the combination of Defendants' actions, including Ms. Vullo's statements in the Guidance Letters and Cuomo Press Release as well as the purported "backroom exhortations," could be interpreted as a veiled threat to regulated industries to disassociate with the NRA or risk DFS enforcement action. This conclusion is enforced by new allegations in the SAC that can be reasonably interpreted as pre-Guidance Letters backroom threats by Ms. Vullo of DFS enforcement against entities that did not disassociate with the NRA. *See* SAC ¶ 21; ¶ 67; ¶ 69.[16] As

[15] The Circuit in *Gerard* wrote:

> "[C]learly established law" cannot be defined "at a high level of generality," [*al-Kidd*, 563 U.S. at 742], but "must be particularized to the facts of the case," *White v. Pauly*, ___ U.S. ___, 137 S. Ct. 548, 552, 196 L. Ed.2d 463 (2017) (internal quotation marks omitted), so as to give a reasonable officer "fair notice that [the complained-of] conduct [is] unlawful," *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L.Ed.2d 583 (2004); *see also Terebesi v. Torreso*, 764 F.3d 217, 231 (2d Cir. 2014) (explaining that, to determine whether the law is clearly established, a court should consider "the specificity with which a right is defined, the existence of Supreme Court or Court of Appeals case law on the subject, and the understanding of a reasonable officer in light of preexisting law").

Gerard, 2021 WL 485722, *1.

[16] The allegations of Ms. Vullo's statements in this regard took place in February 2018 whereas the Guidance Letters were issued on April 19, 2018.

expressed in the Court's previous decision, the law was clearly established at the time that First Amendment rights could be violated by the chilling effect of governmental action that falls short of a direct prohibition against speech but that can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request. *See* Dkt. 56 at 18 (and cases cited threat). When a qualified immunity defense is raised on a Rule 12(b)(6) motion, the Court must accept the truth of the allegations in the complaint and may grant qualified immunity only if the facts supporting the defense appear on the face of the complaint. *See Hyman v. Abrams*, 630 F. App'x 40, 42 (2d Cir. 2015) ("Although, usually, the defense of qualified immunity cannot support the grant of a Rule 12(b)(6) motion for failure to state a claim upon which relief can be granted, a district court may grant a Rule 12(b)(6) motion on the ground of qualified immunity if the facts supporting the defense appear on the face of the complaint. Consequently, a defendant presenting an immunity defense on a Rule 12(b)(6) motion instead of a motion for summary judgment must accept [that] . . . the plaintiff is entitled to all reasonable inferences from the facts alleged, not only those that support his claim, but also those that defeat the immunity defense.") (citing *McKenna v. Wright*, 386 F.3d 432, 435-36 (2d Cir. 2004)) (interior quotation marks omitted). Here, when doing so, a question of material fact exists as to whether Ms. Vullo explicitly threatened Lloyd's with DFS enforcement if the entity did not disassociate with the NRA. Based on this question of material fact,

and even assuming an objectively reasonable person would not have known that the Guidance Letters or Ms. Vullo's statements in the Cuomo Press Release could be construed as implied threats to regulated entities if they did not disassociate with the NRA, qualified immunity on the First Amendment claims must be denied at this time. Further, because Ms. Vullo's alleged implied threats to Lloyd's and promises of favorable treatment if Lloyd's disassociated with the NRA could be construed as acts of bad faith in enforcing the Insurance Law in New York, a question of material fact exists as to whether she is entitled to qualified immunity under New York law. *See Gardner v. Robinson*, No. 16CIV1548GBDRWL, 2018 WL 722858, at *2-3 n. 7 (S.D.N.Y. Feb. 6, 2018) ("Although qualified immunity only extends to public officials against whom federal causes of action are asserted, New York common law provides comparable immunity from state law claims unless 'the officials' actions are undertaken in bad faith or without a reasonable basis.'") (quoting *Jones v. Parmley*, 465 F.3d 46, 63 (2d Cir. 2006) (citations omitted)). For these reasons, the Court will deny qualified immunity to Ms. Vullo on the First Amendment claims at this time.

b. Cuomo, DFS, and Lacewell's Motion

Relevant Procedural Background

On Defendants' Rule 12(c) motion, in response to Defendants' argument that all Section 1983 claims against DFS must be dismissed because DFS is not a

"person" under § 1983, Plaintiff withdrew its Section 1983 claims against DFS resulting in dismissal of these claims. Dkt. No. 112 at 12. The Court also found that the Eleventh Amendment barred claims for money damages against DFS, and against Gov. Cuomo and Ms. Vullo in their official capacities. *Id.* Thus, all such claims were dismissed. *Id.* The Court also dismissed without prejudice the selective enforcement claims against Gov. Cuomo and Ms. Vullo in their individual capacities. *Id.* As indicated above, Judge Hummel granted Plaintiff's motion to amend only to the extent it sought to assert a selective enforcement claim against Ms. Vullo in her individual capacity, and to substitute Supt. Lacewell for Ms. Vullo on Plaintiff's claim for injunctive relief. Thus, as Defendants assert, what remains in Counts One and Two of the SAC, as asserted against DFS, are only claims under the New York State Constitution. What remains in Counts One and Two of the SAC, as asserted against Gov. Cuomo in his official capacity, are Section 1983 claims of violations of the U.S. Constitution and claims under the New York State Constitution.

Sovereign Immunity

Defendants DFS and Gov. Cuomo (collectively "Defendants") argue that all remaining claims against DFS, Supt. Lacewell in her official capacity,[17] and Gov.

[17] In the motion, Supt. Lacewell in her official capacity is treated collectively with DFS because "[f]or the purpose of the arguments contained [in the motion] there is no difference

Cuomo in his official capacity must be dismissed as barred by Eleventh Amendment sovereign immunity. This includes, Defendants contend, Plaintiff's claims against DFS under the New York State Constitution and the claims for injunctive and declaratory relief sought in the SAC. Defendants also assert that "in addition to barring the NRA's claims against DFS, the Eleventh Amendment also bars all claims against the Governor in his official capacity, including requested injunctive relief." Dkt. No. 210-1 at 3. Plaintiff counters that "Defendants' conduct throughout this litigation is wholly incompatible with their belated claim of sovereign immunity." Dkt. No. 219 at 2. Plaintiff contends that "[a]lthough Defendants did assert sovereign immunity regarding certain claims for money damages against DFS, and Cuomo and Vullo in their official capacities, Defendants never asserted sovereign immunity with respect to the NRA's First Amendment claims for declaratory and injunctive relief." *Id.* Plaintiff asserts that there is no valid reason why Defendants "should belatedly be permitted to assert" the Eleventh Amendment defense now, and thus Defendants have waived sovereign immunity. *Id.* Plaintiff also argues that Defendants waived sovereign immunity by appearing in this case and defending on the claims asserted herein.

The Eleventh Amendment bars suits against New York State unless it has consented to be sued, or federal legislation has overridden the State's sovereign

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between the office of the Superintendent and the Department which she oversees." Dkt. No. 210-1 at 1, n. 1.

immunity. *Will v. Michigan Dep't. of the State Police*, 491 U.S. 58, 64 (1989); *see Gollomp v. Spitzer*, 568 F.3d 355, 366 (2d Cir. 2009) ("[A]s a general rule, state governments may not be sued in federal court unless they have waived their Eleventh Amendment immunity, or unless Congress has abrogated the states' Eleventh Amendment immunity."). Eleventh Amendment immunity also extends to suits against state officers in their official capacities. *See Will*, 491 U.S. at 71 ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself.") (citations omitted). Eleventh Amendment immunity applies whether the claims are asserted under the United States Constitution or a court's pendent jurisdiction. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 117-118 (1984); *see*, *e.g.*, *Treistman v. McGinty*, 804 F. App'x 98, 99 (2d Cir. 2020) ("'[A] claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment.'") (quoting *Pennhurst*, 465 U.S. at 121); *Feng Li v. Lorenzo*, 712 F. App'x 21, 23-24 (2d Cir. 2017) (same); *see also Báez v. New York*, 629 F. App'x 116, 118 (2d Cir. 2015) (affirming dismissal of claims under New York law against the State Office of Temporary and Disability Assistance on the basis of sovereign immunity). "As to the State . . . the Eleventh Amendment bars a suit regardless of the nature of the relief sought." *Feng Li v. Rabner*, 643 F. App'x 57, 58 (2d Cir. 2016) (quotation omitted); *see Everett v. Dean*, No. 3:20-CV-1260 (FJS/ML), 2021 WL 765762, at *6

(N.D.N.Y. Feb. 26, 2021) (Rep. Rec. & Order) ("Regardless of the nature of the relief sought, in the absence of the State's consent or waiver of immunity, a suit against the State or one of its agencies or departments is proscribed by the Eleventh Amendment.") (citing *Pennhurst*, 465 U.S. at 100).

There is no merit to the argument that sovereign immunity should be denied because it was belatedly asserted. Defendants had previously raised the sovereign immunity defense in their Answer and in a motion to dismiss. *See* Dkt. No. 59, at p. 55; Dkt. No. 63-1 at pp. 4, 6-7. The fact that it was not previously addressed to the claims for relief in the SAC is of no moment. Sovereign immunity may be asserted at anytime in a proceeding. *See McGinty v. New York*, 251 F.3d 84, 94 (2d Cir. 2001) ("[T]he Supreme Court and this Court have repeatedly held that a state may assert Eleventh Amendment sovereign immunity at any time during the course of proceedings.") (citing *Calderon v. Ashmus*, 523 U.S. 740, 745 n. 2 (1998) (the Eleventh Amendment is jurisdictional in that it limits a federal court's judicial power, and may be invoked at any stage of the proceedings); *Pennhurst*, 465 U.S. at 99 n. 8 (same); *Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426, 449 (2d Cir. 1999) (the defense of Eleventh Amendment immunity need not be raised in trial court to be considered on the merits); *Leonhard v. United States*, 633 F.2d 599, 618 n. 27 (2d Cir. 1980) (sovereign immunity need not be expressly raised in the district court or on appeal since it is a jurisdictional defect and may be raised at any time)). The fact that the NRA

incurred expenses related to discovery and other matters in this hotly contested matter does not, by itself, provide a basis to deprive New York State of sovereign immunity. *See Beaulieu v. Vermont*, 807 F.3d 478, 491 (2d Cir. 2015) ("It is true that Defendants changed their strategy and that earlier invocation of Vermont's immunity might have resulted in earlier dismissal, sparing Plaintiffs some burden and expense. But there is no record of duplicitous conduct by Defendants or of serious unfairness to Plaintiffs resulting from the tardy invocation of immunity."). Similarly, the fact that Defendants did not respond to Plaintiff's query whether Defendants would waive sovereign immunity on the state constitutional claims after Plaintiff conceded that DFS is not a person subject to suit under § 1983, *see* Dkt. 219 at 5,[18] provides no basis to deprive New York of sovereign immunity. Defendants had no obligation to respond, and Plaintiff is represented by

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[18] Plaintiff argues:

> In their third motion to dismiss under Fed. R. Civ. 12(c), Defendants alleged that the NRA's claims for money damages were barred by the Eleventh Amendment but failed to raise that same argument for the NRA's request for declaratory and injunctive relief. In its January 8, 2019 opposition to that motion, the NRA specifically raised the issue stating that "[a]t this stage, the NRA agrees to withdraw its Section 1983 claims under Counts 1, 2, and 4 against DFS. Should DFS additionally choose not to waive sovereign immunity with respect to the pending state law claims against it, the NRA will agree to withdraw those claims and will promptly re-file its claims . . . in the appropriate State court." Defendants completely ignored that statement in their reply.

experienced counsel. Plaintiff's counsel could have analyzed whether Defendants' silence indicted a negative response and determined whether, if it did, it was worth continuing in this court given the possibility that Defendants could later invoke sovereign immunity.

There is also no merit to Plaintiff's argument that Defendants waived sovereign immunity by litigation in this matter. "Eleventh Amendment immunity is lost only if Congress unequivocally abrogates states' immunity or a state expressly consents to suit." *Cosby v. LaValley*, 2015 WL 13843440, *4 (N.D.N.Y. Nov. 16, 2015). Because of the "vital role of the doctrine of sovereign immunity in our federal system[,]" waiver will only be found where it is "unequivocally expressed." *Pennhurst*, 465 U.S. at 99. The courts that have found that a State waived its sovereign immunity by litigation occurred in situations where a State voluntarily and affirmatively invoked a federal court's jurisdiction to resolve a claim presented by the State. *See*, *e.g.*, *Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 619 (2002) ("And the Court has made clear in general that 'where a State *voluntarily* becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment.'") (quoting *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906)) (emphasis added in *Lapides*); *Fifth Ave. Assocs., L.P. v. N.Y. State Dep't of Taxation & Fin. (In re 995 Fifth Ave. Assocs., L.P.)*, 963 F.2d 503, 506 (2d Cir. 1992)

(finding waiver where, after a debtor sought a declaration in bankruptcy court that it was exempt from the tax and entitled to a refund from the state, the State filed an administrative expense claim for additional gains tax liability); *Gulino v. Bd. of Educ. of the City Sch. Dist. of the City of New York*, No. 96 CIV. 8414, 2016 WL 7320775, at *7 (S.D.N.Y. July 18, 2016), *report and recommendation adopted*, No. 96 CIV. 8414 (KMW), 2016 WL 7243544 (S.D.N.Y. Dec. 14, 2016) ("[T]he cases involving waiver-by-litigation premise the waiver on a State actually appearing as a party and submitting its rights for judicial determination.") (collecting cases). By contrast, the courts have found no waiver where a State is involuntarily a defendant in a case but proceeds only to defend itself on a claim brought by a plaintiff. *See*, *e.g.*, *McGinty v. New York*, 251 F.3d 84, 94 (2d Cir. 2001) ("What distinguishes the present case from *995 Fifth Avenue Associates* is that here no affirmative claim was made by the State of New York, the Department or the Retirement System. Thus, their involvement in the EEOC proceeding constitutes no waiver of sovereign immunity."); *see also Lapides*, 535 U.S. at 622 ("[T]he Eleventh Amendment waiver rules are different when a State's federal-court participation is involuntary.") (citing *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504 (1890); U.S. Const., Am dt. 11 (discussing suits "commenced or prosecuted against" a State)). "[T]he crucial considerations are the voluntariness of the state's choice of forum and the functional consequences of that choice." *Mohegan Tribe v. State of Conn.*, 528 F. Supp. 1359, 1366-1367 (D. Conn. 1982). New York has not unequivocally

expressed waiver of immunity, nor has it waived this immunity simply by defending the claims against it. To hold otherwise would mean a waiver of sovereign immunity occurs every time a State appears in federal court to defend itself in litigation. Such a result is not supported by either case law or logic.

The Court finds no reason to deprive New York or its officers acting in their official capacities of sovereign immunity, or to deem that immunity waived. Accordingly, all claims against DFS are dismissed. The claims against New York's officers acting in their official capacities are also dismissed unless an exception to Eleventh Amendment immunity applies.

Ex parte Young

Plaintiff contends that if immunity applies, the exception to Eleventh Amendment immunity articulated in *Ex parte Young* applies to Gov. Cuomo in his official capacity. Under the doctrine of *Ex Parte Young*, a "plaintiff may avoid the Eleventh Amendment bar to suit and proceed against individual state officers, as opposed to the state, in their official capacities, provided that [the] complaint[:] (a) alleges an ongoing violation of federal law[;] and (b) seeks relief properly characterized as prospective." *Clark v. DiNapoli*, 510 F. App'x 49, 51 (2d Cir. 2013) (internal quotation marks and citation omitted). The Supreme Court has declined to extend the reasoning of *Ex Parte Young* to claims for retrospective relief. *See Green v. Mansour*, 474 U.S. 64, 68 (1985) (citations omitted). "The line between

prospective and retrospective relief is drawn because '[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law,' whereas 'compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment.'" *Ward v. Thomas*, 207 F.3d 114, 119 (2d Cir. 2000) (quoting *Green*, 474 U.S. at 68). "Accordingly, suits against states and their officials seeking damages for past injuries are firmly foreclosed by the Eleventh Amendment." *Id.* (citations omitted). "In determining whether the doctrine of *Ex Parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Maryland Inc. v. Public Serv. Comm. of Maryland*, 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997)).

Past Conduct

Defendants contend that *Ex parte Young* is inapplicable because the claims in the SAC concern only past conduct. In this regard, Defendants argue that the First Amendment and State Constitutional free speech claims, the only claims remaining as to Defendants, challenge the press releases and "backroom exhortations" that supposedly occurred in the past. Thus, Defendants maintain, the SAC's claims rely exclusively on past conduct. Plaintiff asserts that its suit alleges an ongoing violation of federal law, citing to

paragraphs 93 and 102 of the SAC to support this proposition. Dkt. No. 219 at 7 (citing SAC ¶¶ 93,[19] 102[20]). In addition, Plaintiffs points to the allegations at paragraphs 61, 80, 81, and 82 of the SAC for the proposition that Defendants' conduct is having an ongoing affect on its ability to maintain business relationships with regulated institutions. Plaintiff also points to an allegation that DFS served a subpoena on an NRA insurance provider, SAC ¶ 79, and the fact that DFS commenced an enforcement proceeding against the NRA, as evidence that Defendants' unconstitutional conduct is ongoing. Plaintiff also points to the SAC where it alleges that "[i]n addition to the above-described damages, absent an injunction against Defendants, the NRA will suffer irrecoverable loss and irreparable harm if it is unable to acquire insurance or

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[19] At paragraph 93, Plaintiff asserts: "Defendants' concerted efforts to stifle the NRA's freedom of speech caused financial institutions doing business with the NRA to end their business relationships, or explore such action, due to fear of monetary sanctions or expensive public investigations. For example, Defendants coerced and caused Lockton, Chubb, and Lloyd's to cease their participation in NRA-endorsed insurance programs, regardless of whether the insurance programs met all legal qualifications under New York's Insurance Law."

[20] At paragraph 102, Plaintiff asserts: "Defendants' actions have concretely harmed the NRA by causing financial institutions doing business with the NRA to end their business relationships, or explore such action, due to fear of monetary sanctions or expensive public investigations. For example, Defendants coerced and caused Lockton, Chubb, and Lloyd's to cease their participation in NRA-endorsed insurance programs in New York and elsewhere, regardless of whether the insurance programs met all legal qualifications under New York's Insurance Law."

other banking services due to Defendants' actions." SAC ¶ 97; ¶ 107 (same).

Just as the Court indicated in its decision denying Plaintiff's request for a preliminary injunction, Plaintiff's First Amendment claims are premised upon actions that took place in 2018. *See* Dkt. 218 at pp. 2-4.[21] Plaintiff's citation to paragraphs 93 and 102 of the SAC does not change this conclusion as these allegations concern Defendants' past actions. Similarly, the allegations in paragraphs 61, 80, 81, and 82 of the SAC allege disruptions of the NRA's relationships with regulated industries caused by Defendants' past conduct. To the extent Plaintiff asserts that it still has trouble maintaining business relationships with regulated industries, that appears to be because of Defendants' past alleged unconstitutional acts, not because of similar ongoing conduct. The fact that DFS issued a subpoena to a regulated entity associated with the NRA that Plaintiff contends demonstrates a continuation of "DFS's selective enforcement," SAC ¶ 79, does not indicate that Defendants are continuing to engage in conduct intended to deprive Plaintiff of its rights to free speech—the claims that remain against DFS—or selective enforcement. A subpoena seeks information but it is not an enforcement action like those that form the basis of the claims in this action. Plaintiff's citation to the DFS enforcement action against the NRA does not indicate that Defendants are continuing the

[21] Although that decision examined the Amended Complaint, the allegations supporting the First Amendment claims in the SAC are essentially the same.

allegedly illegal conduct that forms the basis of this lawsuit. Although the NRA was well aware for some time that DFS was investigating it for Insurance Law violations, *see* Dkt. No. 56 at 4 ("As part of its investigation, DFS learned that, although it did not have an insurance producer license from DFS, the NRA engaged in marketing of, and solicitation for, the Carry Guard program."), there is no allegation in the SAC that this conduct is the basis of the free speech or equal protection claims asserted therein.[22] Plaintiff's professed need for an injunction does not provide a factual basis indicating that there is an ongoing violation of Plaintiff's right to free speech. Plaintiff's fear that Defendants might repeat their past alleged conduct that violated Plaintiff's rights to free speech is insufficient to conclude that the past conduct is occurring or will occur in the future. In the end, the claims in the SAC are based on Defendants' past actions, not on an ongoing course of action.

[22] It is worth noting that after the enforcement action against the NRA was commenced, the NRA entered a Consent Order in which it agreed to a $2.5 penalty and a five-year ban on doing incurrence business in New York. *See* Dkt. No. 312.

Injunctive Relief [23]

Defendants argue that even if it could be construed that there is an ongoing constitutional violation asserted in the SAC, Plaintiff seeks an improper "obey the law" injunction. The injunction that Plaintiff seeks is, at least in part, an improper "obey the law" injunction. Further, the totality of the sought-after injunction is improper because it violates the specificity requirements set forth at Rule 65(d) of the Federal Rules of Civil Procedure. Under Rule 65(d), "[e]very order granting an injunction and every restraining order must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other

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[23] In its Request for Relief, Plaintiff seeks:

> [A] preliminary and permanent injunction . . . ordering DFS, its agents, representatives, employees and servants and all persons and entities in concert or participation with it, Cuomo (in his official capacity) and the current Superintendent of DFS (in her/his official capacity):
>
> (1) to immediately cease and refrain from engaging in any conduct or activity which has the purpose or effect of interfering with the NRA's exercise of the rights afforded to it under the First and Second Amendment to the United States Constitution and Section8 to the New York Constitution; and
>
> (2) to immediately cease and refrain from engaging in any conduct or activity which has the purpose or effect of interfering with, terminating, or diminishing any of the NRA's contracts and/or business relationships with any organizations[.]

SAC at pp. 41-42.

document—the act or acts restrained or required." Fed. R. Civ. P. 65(d). As the Second Circuit has instructed:

> "[U]nder Rule 65(d), an injunction must be more specific than a simple command that the defendant obey the law." *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 51 (2d Cir. 1996). "To comply with the specificity and clarity requirements, an injunction must 'be specific and definite enough to apprise those within its scope of the conduct that is being proscribed.'" *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1352 (2d Cir. 1989) (quoting *In re Baldwin-United Corp.*, 770 F.2d 328, 339 (2d Cir. 1985)). "This rule against broad, vague injunctions 'is designed to prevent uncertainty and confusion on the part of those to whom the injunction is directed,' and to be sure 'that the appellate court knows precisely what it is reviewing.'" *Rosen v. Siegel*, 106 F.3d 28, 32 (2d Cir. 1997) (quoting *Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd.*, 824 F.2d 665, 669 (8th Cir. 1987)).

S.C. Johnson & Son, Inc. v. Clorox Co., 241 F.3d 232, 240-41 (2d Cir. 2001).

Plaintiff's request for a injunction requiring Defendants to "immediately cease and refrain from engaging in any conduct or activity which has the purpose or effect of interfering with the NRA's exercise of the rights afforded to it under the First and Second Amendment to the United States Constitution and Section 8 to the New York Constitution" is vague and does not describe in reasonable detail the act or acts

sought to be restrained. The injunction is not specific and definite enough to apprise those within its scope of the conduct that is being proscribed. *See id.* Further, the injunction does "not require a defendant to do anything more than that already imposed by law," subjects the defendants to contempt for unspecified conduct, and is "not readily capable of enforcement." *See Dublino v. McCarthy*, No. 9:19-CV-0381 (GLS/DJS), 2019 WL 2053829, at *20 (N.D.N.Y. May 9, 2019). As such, it is an "obey the law" injunction that is "not favored" in the law, *id.* (citing cases), and fails to comply with Rule 65(d)'s specificity requirements.

The second part of the requested injunction also seeks an injunction that fails to comply with Rule 65(d)'s specificity requirements. Plaintiff requests an injunction that requires Defendants to "immediately cease and refrain from engaging in any conduct or activity which has the purpose or effect of interfering with, terminating, or diminishing any of the NRA's contracts and/or business relationships with any organizations[.]" This does not define with any specificity what conduct or activity could be deemed to have "the purpose or effect of interfering with, terminating, or diminishing any of the NRA's contracts and/or business relationships with any organizations." While the injunction does not necessarily command that the Defendants comply with some specific provision of law, the injunction is not specific and definite enough to apprise those within its scope of the conduct that is being proscribed, *see S.C. Johnson & Son, Inc.*, 241 F.3d at 240-41, subjects Defendants to contempt

for non-specific reasons, and is unenforceable. As such the sought-after injunction is improper because it fails to comply with Rule 65(d)'s specificity mandate.

Because the SAC fails to allege an ongoing violation of federal law, and seeks an improper injunction as prospective relief, *Ex parte Young* does not avoid an Eleventh Amendment bar to suit against either Gov. Cuomo or Supt. Lacewell in their official capacities relative to the sought-after injunction.

Declaratory Relief [24]

Defendants argue that because Plaintiff's Section 1983 claims against DFS have been withdrawn and any requests for monetary or injunctive relief are barred by the Eleventh Amendment, "Plaintiff's bald request for a declaration pursuant to the [Declaratory Judgment Act (DJA)] that Defendants have violated the NRA's rights to free speech and equal protection under both the Federal and New York Constitutions is insufficient to confer subject matter jurisdiction over DFS." Dkt. 210-1 at 12; *see also id.* at 11-12 (citing cases for the propositions that the DJA does not expand the jurisdiction of the federal courts, the DJA does not provide an independent basis for jurisdiction, and a plaintiff seeking relief under the DJA must have

[24] Plaintiff seeks a judgment "[d]eclaring . . . that Defendants have violated the NRA's rights to free speech and equal protection under both the Federal and New York Constitutions."

an independent basis for jurisdiction). Based on the cases cited by Defendants, the Court agrees.

Defendants also argue that even if there were a jurisdictional basis to entertain Plaintiff's request for declaratory relief, the NRA's sought-after declaration would be barred as against Defendants by the Eleventh Amendment. *Id.* at 12-13. The Court agrees.

As indicated above, the two counts that remain against Defendants allege that DFS violated the NRA's rights to free speech in the past. The declaration Plaintiff seeks would declare that Defendants' past conduct violated Plaintiff's rights under both the Federal and New York Constitutions. The Second Circuit has explained that in circumstances like these where a declaration "could say no more than that [a State] had violated [the] law in the past," that relief is barred by the Eleventh Amendment. *Ward*, 207 F.3d at 120; *see id.* ("'A declaratory judgment is not available when the result would be a partial end run around' the Eleventh Amendment's bar on retrospective awards of monetary relief.") (quoting *Green*, 474 U.S. at 72). Here, because Plaintiff seeks retrospective declaratory relief against Defendants, it is barred by the Eleventh Amendment. *See Treistman v. McGinty*, 804 F. App'x 98, 99 (2d Cir. 2020) ("The complaint sought declaratory relief that was properly characterized as retrospective. Treistman sought a declaration stating that the defendants violated state regulations and that the family courts had a policy to violate state regulations. This is entirely retrospective and is barred by Eleventh Amendment immunity.") (citing *Ward*, 207 F.3d at 120);

Kaminski v. Semple, 796 F. App'x 36, 38 (2d Cir. 2019), *cert. denied*, ___ U.S. ___, 141 S. Ct. 434, 208 L. Ed. 2d 130 (2020) ("[A] declaration dealing only with past events would be retrospective and barred.") (citing *Ward*, 207 F.3d at 120 ("Any declaration could say no more than that Connecticut had violated federal law in the past . . . [and] would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment.") (internal quotation marks omitted)); *H.B. v. Byram Hills Cent. Sch. Dist.*, 648 F. App'x 122, 125 (2d Cir. 2016) ("[T]he requested declaratory relief is aimed at past conduct, a target that is impermissible.") (citing *Ward*, 207 F. 3d at 120 (declaratory relief unavailable because "[a]ny declaration could say no more than that [the state] had violated federal law in the past"); *Am. Civil Liberties Union of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 53 (1st Cir. 2013) ("With limited exceptions, not present here, issuance of a declaratory judgment deeming past conduct illegal is also not permissible as it would be merely advisory.")); *see also Szymonik v. Connecticut*, 807 F. App'x 97, 101 (2d Cir. 2020) ("The Eleventh Amendment bars federal courts from issuing retrospective declaratory relief against state officials for past violations of federal law.") (citing *Green*, 474 U.S. at 68; *Ward*, 207 F.3d at 119, 120 (declaratory relief unavailable because "[a]ny declaration could say no more than that Connecticut [and the defendant official] had violated federal law in the past"); *Am. Civil Liberties Union of Mass.*, 705 F.3d at 53).

IV. CONCLUSION

For the reasons set forth above, the motion by DFS and Gov. Cuomo in his official capacity seeking to dismiss claims in the Second Amended Complaint, Dkt. No. 210, is **GRANTED**. Plaintiff's claims in the Second Amended Complaint against DFS, Gov. Cuomo in his official capacity, and Supt. Lacewell in her official capacity, including the claims for injunctive and declaratory relief, are **DISMISSED** as barred by the Eleventh Amendment.

Ms. Vullo's motion appealing Magistrate Judge Hummel's decision granting leave to amend, and seeking to dismiss the claims against her in the Second Amended Complaint, Dkt. No. 211, is **GRANTED in part** and **DENIED in part**. The selective enforcement claim against Ms. Vullo is **DISMISSED**, the motion is denied as to the First Amendment claims, and the appeal of Judge Hummel's decision granting leave to amend is denied.

IT IS SO ORDERED.

Dated: March, 15, 2021

/s/ Thomas J. McAvoy
Thomas J. McAvoy
Senior, U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NATIONAL RIFLE ASSOCIATION OF AMERICA,

Plaintiff,

-against- 1:18-CV-0566

ANDREW CUOMO, both individually and in his official capacity; MARIA T. VULLO, both individually and in her official capacity; and THE NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES,

Defendants.

THOMAS J. McAVOY,
Senior United States District Judge

DECISION & ORDER

(Filed Nov. 6, 2018)

I. INTRODUCTION

Plaintiff the National Rifle Association of America ("Plaintiff" or "the NRA") commenced this action against defendants New York Governor Andrew Cuomo, both individually and in his official capacity ("Gov. Cuomo"); Superintendent of the New York State Department of Financial Services Maria T. Vullo, both individually and in her official capacity ("Supt. Vullo"); and the New York State Department of Financial Services ("DFS") (collectively, "Defendants"). In the

Amended Complaint, Plaintiff asserts several federal and New York state constitutional claims, and a New York common law tort claim. *See* Am. Compl., Dkt. No. 37, *passim*. Presently before the Court is Defendants' motion pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the Amended Complaint for failure to state claims upon which relief can be granted. Dkt. No. 40. The Court has considered the parties' briefs, *see* Dkt. Nos. 40, 48, 51; the briefs of amici curiae the Texas Public Policy Foundation and the American Civil Liberties Union Foundation, *see* Dkt. Nos. 46, 49; and entertained oral argument from the parties related to claims asserting freedom of speech and due process violations. Oral Arg. Trans., Dkt. No. 52. For the reasons that follow, Defendants' motion is granted in part and denied in part.

II. STANDARD OF REVIEW

On a Fed. R. Civ. P. 12(b)(6) motion, the Court must accept "all factual allegations in the complaint as true, and draw[] all reasonable inferences in the plaintiff's favor." *Holmes v. Grubman*, 568 F.3d 329, 335 (2d Cir. 2009) (internal quotation marks omitted). This tenet does not apply to legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Similarly, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements . . . are not entitled to the assumption of truth." *Id.*; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (stating that a court is "not bound to accept as true a legal conclusion couched as a factual allegation").

In considering a Rule 12(b)(6) motion, the Court "may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). A claim will only have "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). "Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. Plausibility is "a standard lower than probability." *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 184 (2d Cir. 2012). "[A] given set of actions may well be subject to diverging interpretations, each of which is plausible," and "[t]he choice between or among plausible inferences or scenarios is one for the factfinder." *Id.* A court "may not properly dismiss a complaint that states a plausible version of the events merely because the court finds that a different version is more plausible." *Id.* at 185. "The role of the court at this stage of the proceedings is . . . merely to determine whether the plaintiff's

factual allegations are sufficient to allow the case to proceed." *Doe v. Columbia Univ.*, 831 F.3d 46, 59 (2d Cir. 2016).

III. BACKGROUND

a. DFS Investigation into the Carry Guard Insurance Program

In October 2017, DFS initiated an investigation of the NRA's affinity Carry Guard insurance program,[1] focusing on two insurance companies, Chubb Ltd. ("Chubb") and Lockton Affinity, LLC ("Lockton"), for underwriting and administering this program. Dkt. Nos. 37-4; 37-5.[2] The Carry Guard program provided, among other policy coverages, (1) liability insurance to gun owners for acts of intentional wrongdoing, and (2) legal services insurance for any costs and expenses incurred in connection with a criminal proceeding resulting from acts of self-defense with a legally possessed firearm, in violation of New York Insurance Law. Dkt. Nos. 37-4; 37-5. The policies issued through the Carry Guard program were underwritten by Chubb and offered by Lockton through New York's excess line market. Dkt. Nos. 37-4 at p. 4; 37-5 at ¶ 13. As part of its investigation, DFS learned that, although it did not have an insurance producer license from DFS, the

[1] Affinity insurance programs are insurance programs endorsed by a membership organization for use by its members.

[2] Dkt. Nos. 37-4 and 37-5 are the Lockton and Chubb Consent Orders entered with DFS on May 2, 2018 and May 7, 2018, respectively, which are appended to the Amended Complaint as Exhibits D and E.

NRA engaged in marketing of, and solicitation for, the Carry Guard program. Dkt. Nos. 37-4 at pp. 4-6; 37-5 at pp. 3-5. DFS also found that Lockton and the NRA together offered at least eleven additional insurance programs (collectively "additional NRA programs")[3] to new and existing NRA members in New York and elsewhere. Dkt. No. 37-4 at pp. 6-7. Pursuant to written agreements with Lloyd's of London ("Lloyd's") and the NRA, Lockton served as the administrator for these additional NRA programs, carrying out such functions as marketing the insurance, binding the insurance, collecting and distributing premiums, and delivering policies to insureds. *Id.* ¶ 16. Lloyd's and Alea London Ltd. ("Alea") served as the underwriters for these additional NRA programs, which Lockton placed through New York's excess line market. *Id.* ¶ 17.

Following initiation of the DFS investigation, Lockton suspended the Carry Guard program on November 17, 2017 and is no longer making Carry Guard policies available to New York residents to purchase. *Id.* ¶ 32. DFS's investigation revealed that Lockton and Chubb violated numerous provisions of the New York Insurance Law in connection with the Carry Guard program and the additional NRA programs. *See*

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[3] The additional NRA programs included: "Retired Law Enforcement Officer Self-Defense Insurance;" "ArmsCare Plus Firearms Insurance;" "No Cost ArmsCare Firearms Insurance;" "Firearms Instructor Plus Liability Insurance;" "Personal Firearms Protection Insurance;" "Gun Collector Insurance;" "Gun Club Insurance;" "Hunt Club Insurance;" "NRA Business Alliance Insurance;" "Gun Show Insurance;" and "Home-based Federal Firearms License Insurance." Dkt. No. 37-4 at pp. 5-6.

Dkt. Nos. 37-4, ¶¶ 34-40; 375, ¶¶ 18-19 (discussed below).

The NRA alleges that throughout the investigation, DFS communicated "backchannel threats" to banks and insurers with ties to the NRA that they would face regulatory action if they failed to terminate their relationships with the NRA. Am. Compl. ¶¶ 38, 45. According to the NRA, the Chairman of Lockton called the NRA on February 25, 2018 and confided that Lockton would need to "drop" the NRA entirely for fear of losing its license to operate in New York, and the next day Lockton tweeted it would discontinue providing brokerage services for all NRA-endorsed insurance programs. *Id.* ¶¶ 42-43. The NRA alleges that, days later, its corporate insurance carrier severed ties with it and said it would not renew coverage at any price. *Id.* ¶ 44. The NRA alleges that the corporate carrier severed its ties with the NRA "because it learned of Defendants' threats directed at Lockton, and feared it would be subject to similar reprisals." *Id.*

b. Cuomo Press Release

On April 19, 2018, Gov. Cuomo issued a press release indicating that he was directing DFS to communicate with insurance companies and financial institutions licensed or doing business in New York and urge them to review their relationships with the NRA and similar gun promotion organizations, and consider whether such relationships "harm their corporate reputations and jeopardize public safety." Dkt.

No. 37-1 ("Cuomo Press Release"). Gov. Cuomo is quoted as stating:

> New York may have the strongest gun laws in the country, but we must push further to ensure that gun safety is a top priority for every individual, company, and organization that does business across the state. I am directing the Department of Financial Services to urge insurers and bankers statewide to determine whether any relationship they may have with the NRA or similar organizations sends the wrong message to their clients and their communities who often look to them for guidance and support. This is not just a matter of reputation, it is a matter of public safety, and working together, we can put an end to gun violence in New York once and for all.

Id.

The press release states that "DFS is encouraging regulated entities to consider reputational risk and promote corporate responsibility in an effort to encourage strong markets and protect consumers." *Id.* Then, following a statement that "[a] number of businesses have ended relationships with the NRA following the Parkland, Florida school shooting in order to realign their company's values," Supt. Vullo is quoted as stating:

> Corporations are demonstrating that business can lead the way and bring about the kind of positive social change needed to minimize the chance that we will witness more of these senseless tragedies. DFS urges all

> insurance companies and banks doing business in New York to join the companies that have already discontinued their arrangements with the NRA, and to take prompt actions to manage these risks and promote public health and safety.

Id.

c. Guidance Letters

Also on April 19, 2018, Supt. Vullo issued "Guidance[s] on Risk Management Relating to the NRA and Similar Gun Promotion Organizations" ("Guidance Letters"), which encouraged financial institutions and insurance companies to consider their relationships with the NRA. Dkt. Nos. 37-2 (Guidance Letter to all insurers doing business in New York); 37-3 (Guidance Letter to the chief executive officers of all New York state chartered or licensed financial institutions). The Guidance Letter to all insurers doing business in New York is prefaced with reference to gun violence tragedies occurring at Marjory Stoneman Douglas High School, Columbine High School, Sandy Hook, Pulse night club, and the Las Vegas music festival, and indicates that there is a social backlash against the NRA and similar organizations "that promote guns that lead to senseless violence" and that "[o]ur insurers are, and have been, vital to the communities they serve for generations and are guided by their commitment to corporate social responsibility, including public safety and health." Dkt. No. 37-2, at 1. This Guidance Letter further indicates:

Insurers' engagement in communities they serve is closely tied to the business they do with their clients and customers and its impact on such communities. Often insurers report to their stakeholders that their performance is based on both their strategic business vision as well as on a commitment to society as a whole. There is a fair amount of precedent in the business world where firms have implemented measures in areas such as the environment, caring for the sick, and civil rights in fulfilling their corporate social responsibility. The recent actions of a number of financial institutions that severed their ties with the NRA after the AR-15 style rifle killed 17 people in the school in Parkland, Florida is an example of such a precedent.

The tragic devastation caused by gun violence that we have regrettably been increasingly witnessing is a public safety and health issue that should no longer be tolerated by the public and there will undoubtedly be increasing public backlash against the NRA and like organizations.

Our insurers are key players in maintaining and improving public health and safety in the communities they serve. They are also in the business of managing risks, including their own reputational risks, by making risk management decisions on a regular basis regarding if and how they will do business with certain sectors or entities. In light of the above, and subject to compliance with applicable laws, the Department encourages its

> insurers to continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations, if any, as well as continued assessment of compliance with their own codes of social responsibility. The Department encourages regulated institutions to review any relationships they have with the NRA or similar gun promotion organizations, and to take prompt actions to managing these risks and promote public health and safety.

Id., at 1-2. The Guidance Letter to the chief executive officers of all New York state chartered or licensed financial institutions contains nearly identical language. *See* Dkt. No. 37-3.

d. Gov. Cuomo's Tweet

On April 20, 2018, Gov. Cuomo publicly tweeted: "The NRA is an extremist organization. I urge companies in New York State to revisit any ties they have to the NRA and consider their reputations, and responsibility to the public." Am. Compl. ¶ 51.

e. Consent Orders

In early May 2018, DFS entered consent orders with Chubb and Lockton related to its investigation ("Consent Orders"). *See* Dkt. Nos. 37-4; 37-5. In the Consent Orders, Lockton and Chubb admitted to various violations of the New York Insurance Law. Dkt. No.

37-4, ¶¶ 34-40;[4] Dkt. No. 37-5, ¶¶ 18-19.[5] Lockton agreed to, *inter alia*, pay a monetary fine of $7,000,000;

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[4] Lockton admitted that it:

(1) compensated the NRA based on the actual premiums collected when the NRA was acting as an unlicensed insurance broker by selling and soliciting insurance in New York, in violation of New York insurance Law § 2116;

(2) acted for and aided an unauthorized Chubb insurer, Illinois Union, in connection with Illinois Union's issuing or delivering policies in New York State, or otherwise issuing policies covering New York State residents, which provided insurance coverage that may not be offered in the New York State excess line market, specifically:

(a) defense coverage in a criminal proceeding that is not permitted by law;

(b) liability coverage for bodily injury or property damage expected or intended from the insured's standpoint in an insurance policy limited to use of firearms and that was beyond the use of reasonable force to protect persons or property; and

(c) coverage for expenses incurred by the insured for psychological counseling support, in violation of New York insurance Law § 2117;

(3) gave, or offered to give, a free one-year NRA membership if a person purchased the Carry Guard Program insurance policy, when the NRA membership benefit was not specified in the policy and exceeded $25 in market value, in violation of New York Insurance Law § 2324(a);

(4) gave, or offered to give, the No Cost Arms Care Firearms Insurance at no cost to NRA members in good standing, in violation of New York Insurance Law § 2324(a);

(5) advertised the financial condition of a Chubb insurer by referring to the insurer's AM Best rating, in violation of New York insurance Law § 2122(a)(1);

(6) called attention to an unauthorized Chubb insurer by advertising Chubb's participation in the Carry Guard Program on

take specific actions to remedy ongoing violations of the New York Insurance Law; not participate in the future in any Carry Guard or similar programs that violate the New York Insurance Law; and not "enter into any agreement or program with the NRA to underwrite or participate in any affinity-type insurance program involving any line of insurance to be issued or delivered in New York State or to anyone known to Lockton to be a New York State resident." Dkt. No. 37-4 at pp. 12-15. The Lockton Consent Order expressly

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the Carry Guard website, in violation of New York Insurance Law § 2122(a)(2); and

(7) failed to properly secure declinations from authorized insurers for each insured, in violation of New York Insurance Law § 2118. Dkt. No. 37-4, ¶¶ 34-40.

[5] Chubb admitted that:

(1) through Illinois Union, it engaged in the business of insurance without a license by issuing or delivering policies in New York State, or otherwise issuing policies covering New York State residents, which provided insurance coverage that may not be offered in the New York State excess line market, specifically:

(a) defense coverage in a criminal proceeding that is not permitted by law;

(b) liability coverage for bodily injury or property damage expected or intended from the insured's standpoint in an insurance policy limited to use of firearms and that was beyond the use of reasonable force to protect persons or property; and

(c) coverage for expenses incurred by the insured for psychological counseling support, in violation of New York Insurance Law § 1102; and

(2) through Illinois Union, it issued liability insurance coverage to New York residents that failed to contain required liability insurance policy provisions, in violation of New York Insurance Law § 3420. Dkt. No. 37-5, ¶¶ 18-19.

allowed Lockton to assist the NRA in procuring insurance for the NRA's own corporate operations. Dkt. No. 37-4 at p. 14, ¶ 43.

Plaintiff asserts that "DFS and Vullo have no legal basis to restrict Lockton's involvement with insurance programs that do not violate New York's Insurance Law; nor do they have authority to regulate insurance transactions outside of New York. Nevertheless, DFS mandated that Lockton never enter into any future agreements with the NRA for legitimate and fully Complaint insurance programs in New York." Am. Compl. ¶ 56. Plaintiff maintains that Lockton would violate the Lockton Consent Order "if it markets an ordinary property, casualty, or life insurance policy in the State of New York that was accompanied by an NRA logo or endorsement—notwithstanding that a comparable logo or endorsement referencing any other affinity or common-cause organization is permissible," and contends that "[t]his provision . . . is deliberate and intended to impair the NRA's ability to negotiate insurance benefits for its members, damage the NRA's goodwill among its membership, and unconstitutionally restrict the NRA's speech on the basis of political animus." *Id.* ¶ 57. The NRA further maintains that several of the violations assessed in the Lockton Consent Order "concern programs commonly engaged in by numerous additional affinity associations that do not publicly advocate for Second Amendment rights" but that were "not targets of Defendants' unconstitutional conduct." *Id.* ¶ 57; *see id.* ¶ 58 (citing similar actions by Lockton related to affinity programs by

organizations that do not advocate Second Amendment rights). The NRA asserts that even if Lockton's conduct identified in the Consent Order "does violate insurance law, DFS's selective enforcement of such offenses as to NRA-endorsed policies—but not as to other policies marketed by Lockton in an identical fashion—constitutes impermissible viewpoint discrimination and a denial of equal protection under the law." *Id.* ¶ 60

Chubb agreed to, *inter alia*, pay a monetary fine of $1,300,000; not participate in the future in any Carry Guard, or similar programs that violate the New York Insurance Law; and not to "enter into any agreement or program with the NRA to underwrite or participate in any affinity-type insurance program involving any line of insurance." Dkt. No. 37-5, pp. 6-7. The Chubb Consent Order expressly allowed Chubb to issue insurance policies to the NRA for the NRA's own corporate operations. Dkt. No. 37-5 at ¶ 22.

The NRA maintains that "[a]lthough DFS restricts Lockton from participating in any affinity-type insurance programs with the NRA in New York or with New York residents, Defendants' restrictions in the Chubb Consent Order contain no geographic constraint whatsoever. Instead, the Chubb Consent Order purports to limit Chubb's involvement with the NRA anywhere, and everywhere, in the world." Am. Compl. ¶ 63. Plaintiff contends that "DFS allows Chubb to continue to underwrite affinity-type insurance programs with other affinity or common-cause organizations that do not publicly advocate for Americans' Second

Amendment rights, so long as Chubb undertakes 'reasonable due diligence to ensure that any entity involved . . . is acting in compliance with the Insurance Law. . . .' The only plausible explanation for the DFS's complete exclusion of NRA-endorsed policies, even those 'in compliance with the Insurance Law,' is that Defendants seek to misuse DFS's power to deprive the NRA of insurance and financial services, on the sole ground that Defendants disapprove of the NRA's viewpoint regarding gun control." *Id.* ¶ 64 (quoting Dkt. No. 37-5 at ¶ 22).

f. May 2018 Press Releases

Also in May 2018, DFS issued two press releases detailing its investigation into the Carry Guard program, the violations of the New York Insurance Law, and the Consent Orders ("DFS Press Releases"). Def. App. at A & B.[6] In its May 2, 2018 Press Release announcing that Lockton had agreed to pay a $7 million fine, DFS states that the NRA Carry Guard insurance program unlawfully provided liability insurance to gun owners for certain acts of intentional wrongdoing and improperly provided insurance coverage for criminal defense in a crime involving a firearm. Def. App. at A. The press release also indicates that the NRA, "which does not have a license from DFS to conduct insurance business in New York, actively marketed

[6] Defendants' Appendixes A and B are the May 2, 2018 and May 7, 2018 DFS Press Releases referenced in the Amended Complaint. Because they are not annexed as exhibits to the Amended Complaint, Defendants appended them to their motion.

and solicited for the Carry Guard program. . . ." *Id.* It further indicates that "DFS will not tolerate conduct by any entity, licensed or otherwise, in contravention of New York Insurance Law, especially when that conduct is such an egregious violation of public policy designed to protect all citizens," and that the Consent Order with Lockton was part of DFS's continuing efforts to "uphold and preserve the integrity of New York law." *Id.*

The May 7, 2018 Press Release announcing that Chubb had agreed to pay a $1.3 million fine contains language identical to that in the Stockton press release related to the illegality of the Carry Guard insurance program and the NRA's active marketing and solicitation for the Carry Guard program even though it is not licensed to conduct insurance business in New York. Def. App. at B. DFS describes the Consent Order with Chubb as "another step in addressing the unlicensed and improper activity connected with the NRA's unlawful Carry Guard program," and states that DFS will "continue its comprehensive investigation into [the] matter to ensure that the New York Insurance Law is enforced and that consumers are no longer conned into buying so-called 'self-defense' insurance coverage." *Id.* The press release also indicates that Chubb has agreed to refrain from, *inter alia*, "[e]ntering into any other agreement or arrangement, including any affinity type insurance program involving any line of insurance involving a contract of insurance involving the NRA, directly or indirectly." *Id.*

g. Response to Guidance Letters and Consent Orders

Shortly after the Consent Orders were made public, Lloyd's announced that it would terminate all affinity insurance programs associated with the NRA, citing the DFS investigations. Am. Compl. ¶ 65. The NRA alleges that it also encountered "serious difficulties" replacing its corporate insurance carrier, and that "nearly every" potential replacement carrier "has indicated that it fears transacting with the NRA specifically in light of DFS's actions against Lockton and Chubb." *Id.* ¶ 66. The NRA further alleges that following the Guidance Letters, "multiple banks" withdrew their bids in the NRA's Request for Proposal ("RFP") process[7] "based on concerns that any involvement with the NRA . . . would expose them to regulatory reprisals." *Id.* ¶ 67. Plaintiff contends: "Defendants' campaign is achieving its intended chilling effect on banks throughout DFS's jurisdiction. Speaking 'on the condition of anonymity,' one community banker from Upstate New York told *American Banker* magazine that in light of the apparent 'politically motivated' nature of the DFS guidance, '[i]t's hard to know what the rules are' or whom to do business with, because bankers must attempt to anticipate 'who is going to come into disfavor with the New York State DFS' or other

[7] The NRA alleges that "during February 2018, the NRA issued a Request for Proposal ("RFP") to multiple banks, inviting them to submit bids to provide depository services, cash-management services, and other basic wholesale banking services necessary to the NRA's advocacy. The NRA received enthusiastic responses from several banks." Am. Compl. ¶ 40.

regulators. Other industry sources told *American Banker* that, 'such regulatory guidelines are frustratingly vague, and can effectively compel institutions to cease catering to legal businesses.'" *Id.* ¶ 68 (quoting Neil Haggerty, *Gun issue is a lose-lose for banks (whatever their stance)*, American Banker (Apr. 26, 2018). The NRA asserts that it suffered tens of millions of dollars in damages as a result of Defendants' actions, which "includ[es], without limitation, damages due to reputational harm, increased development and marketing costs for any potential new NRA-endorsed insurance," *id.* ¶ 69, ¶ 111 (same), and "lost royalty amounts owed to the NRA." *Id.* ¶ 80. The NRA further asserts that without access to essential banking and insurance services, "it will be unable to exist as a not-for-profit or pursue its advocacy mission." *Id.* ¶ 70.

IV. DISCUSSION

1. Freedom of Speech

Count One alleges that "Defendants' actions—including but not limited to the issuance of the April 2018 [Guidance] Letters and the accompanying backroom exhortations, the imposition of the Consent Orders upon Chubb and Lockton, and the issuance of the Cuomo Press Release—established a 'system of informal censorship' designed to suppress the NRA's speech." Am. Compl. ¶ 75 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 71 (1963)). Plaintiff asserts that Defendants took these actions "with the intent to obstruct, chill, deter, and retaliate against the NRA's

core political speech." *Id.* ¶ 76. Plaintiff contends that these actions "constitute a concerted effort to deprive the NRA of its freedom of speech by threatening with government prosecution services critical to the survival of the NRA and its ability to disseminate its message," and amount to "an 'implied threat[ ] to employ coercive state power' against entities doing business with the NRA." *Id.* ¶ 77 (quoting *Okwedy v. Molinari*, 333 F.3d 339, 342 (2d Cir. 2003)). Plaintiff maintains that Defendants' actions have caused "financial institutions doing business with the NRA to end their business relationships, or explore such action, due to fear of monetary sanctions or expensive public investigations." *id.* ¶ 78, and, in turn, "resulted in significant damages to the NRA, including but not limited to damages due to reputational harm, increased development and marketing costs for any potential new NRA-endorsed insurance programs, and lost royalty amounts owed to the NRA." *Id.* ¶ 80.

Count Two alleges that these same actions by Defendants "were in response to and substantially caused by the NRA's political speech regarding the right to keep and bear arms. Defendants' actions were for the purpose of suppressing the NRA's pro-Second Amendment viewpoint. Defendants undertook such unlawful conduct with the intent to obstruct, chill, deter, and retaliate against the NRA's core political speech." *Id.* ¶ 86. Like with Count One, Plaintiff alleges that Defendants' actions have "caused financial institutions doing business with the NRA to end their business relationships, or explore such action, due to fear of

monetary sanctions or expensive public investigations," *id.* ¶ 87, and caused the same damages to the NRA as alleged in Count One. *Id.* ¶ 90.

Because the alleged "censorship campaign" challenged in Count One, and the alleged illegal retaliation asserted in Count Two, are based upon the same conduct, caused the same response from regulated entities doing business with the NRA, and resulted in the same damages, and because the lion's share of the parties' First Amendment freedom-of-speech arguments are addressed to both causes of action, *see e.g.* Def. Mem. L. pp. 17-30; Pl. Mem. L. pp. 6-21; Pl. Mem. L. p. 9 ("Taken together, Defendants' threatened and actual regulatory reprisals constitute a cohesive censorship-and-retaliation campaign."), the Court addresses these counts together.

The First Amendment[8] guards against government action "targeted at specific subject matter," a form of speech suppression known as content based discrimination. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2230 (2015); *see Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829-30 (1995)

[8] Because violations of Article 1, § 8 of the New York State Constitution are subject to the same analysis as claims bought pursuant to the First Amendment, *see*, *e.g.*, *Martinez v. Sanders*, 307 F. App'x 467, 468 n.2 (2d Cir. 2008) (citing *Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26*, 638 F.2d 404 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982)); *Congregation Rabbinical College of Tartikov, Inc. v. Vill. of Pomona*, 138 F. Supp. 3d 352, 445 (S.D.N.Y. Sept. 29, 2015), the Court relies upon First Amendment freedom of speech jurisprudence in analyzing Counts One and Two.

(Government action aimed at the suppression of "particular views . . . on a subject," and which discriminates based on viewpoint, is "presumptively unconstitutional."). The Guidance Letters and the Cuomo Press Release indisputably are directed at the NRA and similar groups based on their "gun promotion" advocacy. However controversial it may be, "gun promotion" advocacy is core political speech entitled to constitutional protection. The Guidance Letters and Cuomo Press Release's comments directed to this protected speech provides a sufficient basis to invoke the First Amendment on these claims.

Defendants argue that the Guidance Letters and Cuomo Press Release are merely government advocacy protected under the government-speech doctrine. The government-speech doctrine provides that the government does not need to be viewpoint-neutral when it chooses to express its own viewpoint on a topic of public interest. *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). But while "the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse." *Matal*, 137 S. Ct. at 1758. If read to allow not only government advocacy, but also government action, it could be used to "silence or muffle the expression of disfavored viewpoints." *Id.* For this reason, courts "must exercise great caution" in applying this doctrine. *Id.*

The Guidance Letters and Cuomo Press Release, read in isolation, clearly fit into the government-speech doctrine as they address matters of public importance on which New York State has a significant

interest. *See Centro De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 115 (2d Cir. 2017) (public safety is a significant governmental interest); *British Int'l Ins. Co. v. Seguros La Republica, S.A.*, 212 F.3d 138, 143 (2d Cir. 2000) ("New York shares with its citizens a significant interest in ensuring that businesses in the heavily regulated insurance industry have sufficient funds within the state where they conduct business to fulfill each individual insurance claim."); *see also* Def. Mem. L., at 31 ("[T]he Guidance Letters were issued to advance the State's interest in ensuring that insurers and financial institutions doing business in New York consider whether business relationships with the NRA, and other similar groups, may jeopardize their corporate reputations and public safety. . . . Management of corporate reputations and risks to New York State businesses, and promotion of public safety and corporate responsibility in an effort to encourage strong markets and protect consumers are certainly significant government interests."); Oral Arg. Trans. at 33 ("[The NRA] agree[s] that risks that affect the soundness of financial institutions are the type that DFS is properly charged with regulating, and reputation risks can even do that in some situations.") Yet Plaintiff does not cite the Guidance Letters and Cuomo Press Release in isolation, but rather contends that these documents, when read in the context in which they were issued, amount to "threats that deliberately invoked DFS's 'risk management' authority to warn of adverse action if institutions failed to support Defendants' efforts to stifle the NRA's speech and to retaliate against the NRA based on its

viewpoint." Am. Compl. ¶ 48. For the reasons that follow, the Court finds that Plaintiff has stated plausible First Amendment freedom of speech claims.

"'First Amendment rights may be violated by the chilling effect of governmental action that falls short of a direct prohibition against speech.'" *Zieper v. Metzinger*, 474 F.3d 60, 65 (2d Cir. 2007) (quoting *Aebisher v. Ryan*, 622 F.2d 651, 655 (2d Cir.1980)); *see also Dorsett v. Cty. of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013) ("To plead a First Amendment retaliation claim a plaintiff must show: (1) he has a right protected by the First Amendment; (2) the defendant's actions were motivated or substantially caused by his exercise of that right; and (3) the defendant's actions caused him some injury.")). As applicable to the allegations in Counts One and Two, "the First Amendment prohibits government officials from encouraging the suppression of speech in a manner which 'can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request.'" *Zieper*, 474 F.3d at 65-66 (quoting *Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir.1983)). In determining whether government statements impede upon First Amendment rights, "what matters is the 'distinction between attempts to convince and attempts to coerce.'" *Id.*, at 66 (quoting *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003) (*per curiam*).

The NRA's First Amendment freedom-of-speech claims turn on the allegations that Defendants issued threats to financial institutions and insurers "that

DFS . . . will exercise its extensive regulatory power against those entities that fail to sever ties with the NRA." Am. Compl. at p. 2. The First Amendment "require[s] courts to draw fine lines between permissible expressions of personal opinion [by public officials] and implied threats to employ coercive state power to stifle protected speech." *Hammerhead*, 707 F.2d at 39. On the one hand, public officials are free to promote their views about public welfare, including by using their bully pulpits to "cajole[ ] and exhort" others to repudiate positions or groups the officials view as pernicious. *Gravel v. United States*, 408 U.S. 606, 625 (1972); *see X-Men Sec., Inc. v. Pataki*, 196 F.3d 56, 70 (2d Cir. 1999) ("[W]e have noted that where a public official, without engaging in any threat, coercion, or intimidation, 'exhort[ed]' private entities not to distribute a board game whose ideas the official viewed as pernicious, the official's speech did not violate any constitutional right of the game's authors.") (quoting *Hammerhead*, 707 F.2d at 39 & n.6). On the other hand, "oral or written statements made by public officials' could give rise to a valid First Amendment claim where comments of a government official can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request." *Okwedy*, 333 F.3d at 342 (internal quotation marks, brackets, and citation omitted). Thus, the critical question here is whether Defendants' statements, including the Guidance Letters and Cuomo Press Release, threatened adverse action against banks and insurers that did not disassociate with the NRA.

When a question exists whether government speech contains a threat of future enforcement action, the First Amendment requires the Court to "look through forms to the substance." *Bantam Books*, 372 U.S. at 67. "While the precise language" of the Cuomo Press Release and Guidance Letters "is certainly important," the Second Circuit has "never held that it is the only relevant factor in determining whether a public official has crossed the line 'between attempts to convince and attempts to coerce.'" *Zieper*, 474 F.3d at 66 (quoting *Okwedy*, 333 F.3d at 344). Rather, the First Amendment requires the Court to consider all the circumstances, including "the entirety of the defendants' [alleged] words and actions," to determine "whether they could reasonably be interpreted as an implied threat." *Id.* In making this determination, the Court examines a number of factors, including: (1) the Defendants' regulatory or other decisionmaking authority over the targeted entities, *see Okwedy*, 333 F.3d at 343 ("[T]he existence of regulatory or other direct decisionmaking authority is certainly relevant to the question of whether a government official's comments were unconstitutionally threatening or coercive. . . ."); (2) whether the government actors actually exercised regulatory authority over targeted entities, *see Bantam Books*, 372 U.S. at 68–69 (the fact that the defendant's notices were "invariably followed up by police visitations" as one factor that was relevant in determining that the notices "serve[d] as instruments of regulation"); *Rattner v. Netburn*, 930 F.2d 204, 210 (2d Cir. 1991) (suggesting that "unannounced visits by police personnel" might be relevant in determining whether

the defendants' actions could be reasonably viewed as an implicit threat), (3) whether the language of the allegedly threatening statements could reasonably be perceived as a threat; *Zieper*, 474 F.3d at 66 (citing *Rattner*, 930 F.2d at 210 (noting that "a threat was perceived and its impact was demonstrable")); *Backpage.com, LLC v. Dart*, 807 F.3d 229, 233–35 (7th Cir. 2015); and (4) whether any of the targeted entities reacted in a manner evincing the perception of an implicit threat. *See Bantam Books*, 372 U.S. at 68 ("The Commission's notices, phrased virtually as orders, reasonably understood to be such by the distributor, invariably followed up by police visitations, in fact stopped the circulation of the listed publications *ex proprio vigore*."); *Rattner*, 930 F.2d at 205–10 (holding that a village trustee's letter to the village's chamber of commerce expressing concern about the plaintiff's political advertisement in the chamber's newsletter and containing a list of businesses at which the trustee shopped, which the chamber's directors viewed as threatening boycott or other retaliatory action by the Village, could "reasonably be viewed as an implicit threat," largely because "a threat was perceived and its impact was demonstrable"). When Defendants' statements and alleged conduct is examined in its totality, there are sufficient allegations to state plausible freedom-of-speech claims.

Supt. Vullo and DFS clearly have regulatory authority over the targeted entities. Supt. Vullo is charged by the New York Financial Services Law with taking all actions that she "believes necessary to . . .

ensure the continued solvency, safety, soundness and prudent conduct of the providers of financial products and services" in the State of New York to "encourage high standards of honesty, transparency, fair business practices and public responsibility." N.Y. Fin. Serv. L. § 201(b)(2), (5). "Reputational risk—the risk that negative publicity regarding an institution's business practices will lead to a loss of revenue or litigation—is just one of the threats to a bank or insurer's safety and soundness on which the Superintendent has previously issued guidance." Def. Reply Mem. L., at 7 (citation omitted). While it is within Supt. Vullo's province to issue the Guidance Letters, she also has the authority to initiate investigations and civil enforcement actions against regulated entities, as well as the power to refer matters to the attorney general for criminal enforcement. N.Y. Fin. Serv. L., Art. 3, § 301(b), (c)(4). The authority to institute enforcement proceedings is one factor supporting a plausible contention that the Guidance Letters are part of an attempt to convey implied threats of coercive action against regulated entities doing business with the NRA.

Further, the government actor need not have direct power to take adverse action over a targeted entity for comments to constitute a threat, provided the government actor has the power to direct or encourage others to take such action. *See Bantam Books*, 372 U.S. at 66–68 (observing that, although the Rhode Island Commission to Encourage Morality in Youth lacked the "power to apply formal legal sanctions," it had the authority to initiate investigations and recommend

prosecutions, thereby imbuing the Commission's "advisory notices" with extra weight, since "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around"); *Okwedy*, 333 F.3d at 344 ("Even though Molinari lacked direct regulatory control over billboards, [PNE Media, LLC ("PNE"), a company that produces and displays billboards,] could reasonably have feared that Molinari would use whatever authority he does have, as Borough President, to interfere with the 'substantial economic benefits' PNE derived from its billboards in Staten Island."). Based on Gov. Cuomo's press release wherein he indicates he is directing DFS to issue the Guidance Letters, it is a reasonable inference that he has the power to direct DFS take other official action, including the commencement of enforcement investigations against regulated institutions. Thus, there is a reasonable basis to conclude that he has the power to effectuate regulatory action against entities doing business with the NRA.

DFS actually exercised regulatory authority over Chubb and Lockton, two regulated entities that fall within the same scope of DFS's authority as the entities addressed in the Guidance Letters and Cuomo Press Release. But this fact, by itself, does not help Plaintiff's claims because Chubb and Lockton admitted violations of New York insurance laws. There are also no allegations that DFS exercised regulatory authority over entities other than Chubb and Lockton. Nevertheless, the Amended Complaint asserts that, during the course of the DFS investigations into

Chubb and Lockton, "DFS communicated to banks and insurers . . . that they would face regulatory action if they failed to terminate their relationships with the NRA, . . . indicating that any business relationship whatsoever with the NRA would invite adverse action." Am. Compl. ¶ 38. This is a powerful factual allegation linking the recommendations in the Guidance Letters and Cuomo Press Release that regulated entities consider (and possibly end) their associations with the NRA, and the enforcement actions carried out by DFS against Chubb and Lockton. At this stage of the litigation, the Court must accept this factual allegation as true. Further, the NRA notes that the Chubb and Lockton Consent Orders, which imposed several million dollars in monetary penalties and permanently prohibited those entities from participating in any NRA-endorsed insurance program in New York State, were announced just two weeks after the Cuomo Press Release and Guidance Letters were issued. *Id.* ¶ 54. Viewing the allegations in the light most favorable to the NRA, and drawing reasonable inferences in its favor, the temporal proximity between the Cuomo Press Release, the Guidance Letters, and the Consent Orders plausibly suggests that the timing was intended to reinforce the message that insurers and financial institutions that do not sever ties with the NRA will be subject to retaliatory action by the state. *See Wrobel v. Cnty. of Erie*, 692 F.3d 22, 32 (2d Cir. 2012) ("A causal relationship can be demonstrated either indirectly by means of circumstantial evidence, including that the protected speech was followed by adverse treatment, or by direct evidence of animus."); *see also Catanzaro v.*

City of New York, 486 Fed. Appx. 899, 902 (2d Cir.2012) ("Where a plaintiff has not alleged a specific connection between protected speech and an adverse action, 'causality can be shown through a close temporal proximity between the employer's awareness of protected conduct and the adverse action.' ") (quoting *Nagle v. Marron*, 663 F.3d 100, 110 (2d Cir. 2011)); *Housing Works, Inc. v. City of New York*, 72 F. Supp.2d 402, 424 (S.D.N.Y.1999) (concluding that the proximity in time between the plaintiff's protected speech and the defendants' conduct constituted indirect evidence of an improper motive). The backroom exhortations combined with the timing of the publically announced Consent Orders provides strong support for Plaintiff's claims.

The Court must also assess whether the language of the Cuomo Press Release and the Guidance Letters could reasonably be perceived as a threat. In the Cuomo Press Release, insurance companies and financial institutions are "urged" to "consider reputational risk that may arise from their dealings with the NRA or similar gun promotion organizations," "take prompt actions to manag[e] these risks," and "join the companies that have already discontinued their arrangements with the NRA." The Guidance Letters contain similar language, "encourag[ing] regulated institutions to review any relationships they have with the NRA or similar gun promotion organizations, and to take prompt actions to managing these risks and promote public health and safety." While neither the Guidance Letters nor the Cuomo Press Release specifically

directs or even requests that insurance companies and financial institutions sever ties with the NRA, a plausible inference exists that a veiled threat is being conveyed. Viewed in the light most favorable to the NRA, and given DFS's mandate—"effective state regulation of the insurance industry" and the "elimination of fraud, criminal abuse and unethical conduct by, and with respect to, banking, insurance and other financial services institutions," N.Y. Fin. Servs. Law § 102(e), (k) ___, the Cuomo Press Release and the Guidance Letters, when read objectively and in the context of DFS's regulatory enforcement actions against Chubb and Lockton and the backroom exhortations, could reasonably be interpreted as threats of retaliatory enforcement against regulated institutions that do not sever ties with the NRA. *See Okwedy*, 333 F.3d at 344 ("Because the district court was considering a motion to dismiss, it should have viewed the language of Molinari's letter in the light most favorable to plaintiffs."); *id.* at 342 (holding that a jury could find that the defendant's letter contained an implicit threat of retaliation where it invoked the defendant's position as the Borough President of Staten Island, pointed out that the targeted company "owns a number of billboards on Staten Island and derives economic substantial benefits from them," and directed the company to contact the defendant's legal counsel and chair of his anti-bias task force); *Rattner*, 930 F.2d at 206-10 (holding, on motion for summary judgment, that there were genuine issues of material fact about whether Defendant's letter—stating that Plaintiff's publication "raises significant questions and concerns about the objectivity and

trust which we are looking for from our business friends"—was "threatening or coercive").

Finally, targeted entities' reactions to the perception of an implicit threat is a factor the Court should consider. Defendants argue that no individual company was singled out or coerced as a result of Defendants' public statements, Def. Mem., L., at 22, but such specific targeting is not required in order to make out a First Amendment claim in these circumstances. *See Hammerhead*, 707 F.2d at 39 (noting that "not a single store was influenced by [defendant's allegedly threatening] correspondence"). The Amended Complaint includes numerous allegations regarding the perception of a threat by New York insurers and financial institutions, and its impact on the NRA's ability to procure insurance and banking services from target entities. *See* Am. Compl. ¶¶ 42, 44, 65-68.[9] These allegations

[9] The NRA alleges that: during DFS's investigation into Lockton, Lockton's chair "confided [to the NRA] that Lockton would need to 'drop' the NRA—entirely—for fear of 'losing [our] license' to do business in New York," Am. Compl. ¶ 42; a week after the Chubb and Lockton consent decrees were entered, Lloyd's of London "announced . . . that it would 'terminate all insurance offered, marketed, endorsed, or otherwise made available' through the NRA in light of the DFS Investigation," *id.* ¶ 65; the NRA's corporate insurance carrier "severed mutually beneficial business arrangements with the NRA because it learned of Defendants' threats directed at Lockton, and feared it would be subject to similar reprisals," *id.* ¶ 44; the "NRA has encountered serious difficulties obtaining [replacement] corporate insurance coverage" because "nearly every carrier has indicated that it fears transacting with the NRA specifically in light of DFS's actions against Lockton and Chubb," *id.* ¶ 66; "[m]ultiple banks withdrew their bids in the NRA's RFP process following the issuance of the

sufficiently support the contention that New York insurers and financial institutions took specific actions in response to their perceptions of a threat.

The allegations in the Amended Complaint are sufficient to create a plausible inference that the Guidance Letters and Cuomo Press Release, when read together and in the context of the alleged backroom exhortations and the public announcements of the Consent Orders, constituted implicit threats of adverse action against financial institutions and insurers that did not disassociate from the NRA.

Contrary to Defendants' argument, actual chilled speech is not necessary to make out a plausible First Amendment claim. "Chilled speech is not the *sine qua non* of a First Amendment claim. A plaintiff has standing if he can show either that his speech has been adversely affected by the government retaliation or that he has suffered some other concrete harm. Various non-speech harms are sufficient to give a plaintiff standing." *Dorsett v. Cty. of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013). The NRA's allegations of significant interference with its business relationships, *see* Am.

April 2018 Letters, based on concerns that any involvement with the NRA—even providing the organization with basic depository services—would expose them to regulatory reprisals," *id.* ¶ 67; and "one community banker from Upstate New York told American Banker magazine that in light of the apparent 'politically motivated' nature of the DFS guidance, '[i]t's hard to know what the rules are' or whom to do business with, because bankers must attempt to anticipate 'who is going to come into disfavor with the New York State DFS' or other regulators," *id.* ¶ 68.

Compl. ¶¶ 65-67, 69-70,[10] and the damages caused by Defendants' actions, *id.* ¶¶ 80, 87, are sufficient to establish a First Amendment injury. *See*, *e.g.*, *Bantam Books*, 372 U.S. at 64 n.6 ("Appellants' standing has not been, nor could it be, successfully questioned. The appellants have in fact suffered a palpable injury as a result of the acts alleged to violate federal law, and at the same time their injury has been a legal injury. The finding that the Commission's notices impaired sales of the listed publications, which include two books published by appellants, establishes that appellants suffered injury.") (citation omitted); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2770 (2014) ("[A] law that operates so as to make . . . beliefs more expensive in the context of business activities imposes a burden on [First Amendment Rights]."); *Zherka v. Amicone*, 634 F.3d 642, 646 (2d Cir. 2011) ("Allegations of loss of business or some other tangible injury as a

[10] The Amended Complaint alleges that Defendants' statements are causing "insurance, banking, and financial institutions doing business with the NRA . . . to rethink their mutually beneficial business relationships with the NRA for fear of monetary sanctions or expensive public investigations." Am. Compl. ¶ 65. As a result, the NRA states that it is at risk of losing "access to basic banking services," that it "has encountered serious difficulties obtaining corporate insurance coverage to replace coverage withdrawn by the Corporate Carrier," and that "there is a substantial risk that NRATV will be forced to cease operating" if it cannot "obtain insurance in connection with media liability." *Id.* ¶¶ 66, 67. The NRA claims it has incurred "tens of millions of dollars in damages based on Defendants' conduct," and that it "will be unable to exist as a not-for-profit or pursue its advocacy mission" if it is unable to obtain basic insurance and financial services. *Id.* ¶¶ 69, 70.

result of a defendant's [retaliatory] statements would suffice to establish concrete harm."); *Davis v. Vill. Park II Realty Co.*, 578 F.2d 461, 463 (2d Cir. 1978) (reversing dismissal of a complaint by president of a tenants' association who claimed that the owner of a federally funded housing project had threatened her with eviction in retaliation for her advocacy of tenants' rights).

The fact that the alleged impact of Defendants' statements and actions was commercial in nature does not remove the case from the First Amendment's protections, or necessarily require a lesser level of scrutiny. *See Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 566 (2011) (Commercial activity is "no exception" to the principle that the First Amendment "requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys.") (internal quotation marks omitted). While commercial speech may generally be subject to intermediate scrutiny, "viewpoint discrimination is scrutinized closely whether or not it occurs in the commercial speech context." *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 39 (2d Cir. 2018). The Amended Complaint contains sufficient allegations plausibly supporting the conclusion that Defendants' actions were taken in an effort to suppress the NRA's gun promotion advocacy. *See* Am. Compl. at ¶¶ 21, 76, 78, 86. Moreover, the NRA's allegations that Defendants' enforcement actions against Lockton and Chubb impeded the NRA's ability to enter contracts for lawful affinity insurance plans, but did not take similar action against other membership organizations that did not

engage in gun promotion advocacy, *see* Am. Compl. at ¶¶ 36-37, provides a plausible basis to conclude that Defendants sought to impose a content-based restriction on NRA-affiliated businesses based on viewpoint animus that serves no substantial government interest.

In the end, the allegations of direct and implied threats to insurers and financial institutions because of these entities' links with the NRA, and the allegations of resulting harm to the NRA's operations, are sufficient to make out plausible First Amendment freedom-of-speech claims. While the NRA may not be able to establish the factual predicates for these claims, it has presented sufficient allegations to allow them to go forward. Accordingly, those portions of Defendants' motion directed to Counts One and Two are denied.

b. Freedom of Association

Count Three alleges a violation of the NRA's rights to freedom of association as protected by the First and Fourteenth Amendments to the United States Constitution, and by Article 1, Section 8 of the New York Constitution. Am. Compl. ¶¶ 93-106. In this regard, the NRA alleges that "Defendants' actions—including but not limited to the issuance of the April 2018 [Guidance] Letters and the accompanying backroom exhortations, the imposition of the Consent Orders upon Chubb and Lockton, and the issuance of the Cuomo Press Release—are, in effect, limiting the NRA's ability to continue to operate as an ongoing entity and engage in

political advocacy." *Id.* ¶ 96. Plaintiff contends that "financial institutions previously doing business with the NRA . . . are ending their business relationships, or exploring such action, due to fear of monetary sanctions or expensive public investigations." *Id.*, ¶ 97. In this regard, the NRA contends that it "has spoken to numerous carriers in an effort to obtain replacement corporate insurance coverage; nearly every carrier has indicated that it fears transacting with the NRA specifically in light of DFS's actions against Lockton and Chubb. Furthermore, multiple banks withdrew their bids following the issuance of the April 2018 Letters, based on concerns that any involvement with the NRA—even providing the organization with bank-depository services—would expose them to regulatory reprisals." *Id.* The NRA maintains that without appropriate insurance and banking services, it will be unable to continue "its existence as a not-for-profit organization and fulfill its advocacy objectives." *Id.* ¶ 98; *see id.* ¶ 99. Plaintiff asserts that "Defendants' actions were taken to specifically target the NRA's and its members' right to associate and express their political beliefs in order to banish pro-Second Amendment views from New York. Believing they could not directly bar the NRA from operating in New York, Defendants instead engaged in a censorship scheme to directly, substantially, and significantly infringe the NRA's and its members' right to associate by depriving it of critical insurance and banking services." *Id.* ¶ 100.

The First Amendment[11] protects association "for the purpose of engaging in . . . activities protected by the First Amendment." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18, 104 S. Ct. 3244, 82 L. Ed.2d 462 (1984). The NRA associates with its members for the purpose of engaging in political advocacy advancing Second Amendment rights, including through letter-writing campaigns, peaceable public gatherings, and other grassroots "lobbying" activities. *See* Am. Compl. at ¶ 95. Association for purposes of Second Amendment advocacy is an activity protected by the First Amendment. *See Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464 (1979) (The First Amendment "protects the right of associations to engage in advocacy on behalf of their members."); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (the First Amendment protects the right "to engage in association for the advancement of beliefs and ideas"); *Tabbaa v. Chertoff*, 509 F.3d 89, 101 (2d Cir. 2007) ("Plaintiffs unquestionably had a protected right to express themselves through association at the [Reviving the Islamic Spirit] Conference."); *Brady v. Colchester*, 863 F.2d 205, 217 (2d Cir. 1988) ("[t]he Supreme Court has recognized a freedom to associate with others to pursue goals independently protected by the first amendment—such as political advocacy . . . ,") (internal quotation marks and citation omitted).

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[11] The New York State Constitution claims at issue here are subject to the same standards as the First Amendment claims. *See* fn. 8, *supra*.

The "first question [the Court] must answer" in determining whether Plaintiff states viable freedom-of-association claims "is whether and to what extent [D]efendants' actions burdened" Plaintiff's right to associate for the purpose of engaging in Second Amendment advocacy. *Tabbaa*, 509 F.3d at 101. "To be cognizable, the interference with [Plaintiff's] associational rights must be 'direct and substantial' or 'significant.'" *Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 228 (2d Cir. 1996) (quoting *Lyng v. Int'l Union*, 485 U.S. 360, 366, 367 & n. 5, 108 S. Ct. 1184, 99 L. Ed.2d 380 (1988)). "Mere incidental burdens on the right to associate do not violate the First Amendment." *Tabbaa*, 509 F.3d at 101.

Plaintiff's allegations, accepted as true for purposes of this motion, indicate that "nearly" every insurance carrier, and "multiple" banks have expressed a fear of transacting with the NRA or withdrawn their bids for services to the NRA because of Defendants' actions as discussed above. While the Court accepts, at it must, that many insurance carriers and banks have refused to offer services to the NRA, and that insurance coverage and banking services are necessary for the NRA to continue its advocacy activities, Plaintiff has not asserted that it is unable to obtain any insurance coverage or any banking services so it can continue its operations. Moreover, even accepting the allegations that multiple insurers and banking institutions have expressed an unwillingness to offer services to the NRA due to Defendants' actions, there are no allegations plausibly supporting the conclusion that

Defendants' actions directly and substantially, or significantly, interfered with the NRA's associational rights. Rather, the Amended Complaint alleges that the Guidance Letters, Consent Orders, press releases, and "backchannel threats" affect insurers and banking institutions' willingness to offer services to the NRA which, in turn, creates a "risk" that the NRA might not be able to offer associational activities such as (1) media coverage through NRATV, (2) circulation of publications and magazines, (3) meetings, rallies, conventions and assemblies, (4) educational programs, Am. Compl. ¶ 98, and (5) letter-writing campaigns. *Id.* at ¶ 95. But the Amended Complaint fails to sufficiently allege that Defendants' actions directly and significantly, or substantially, hampered the NRA's right to associate with its members. While the NRA's ability to obtain insurance coverage and banking services from entities regulated in New York state may be impaired by Defendants' actions, this imposes only an incidental burden on the NRA's right to engage in expressive association. *Cf. Lyng*, 485 U.S. at 367, 108 S. Ct. 1184 (concluding that a burden is merely incidental when it is "exceedingly unlikely" that a defendant's actions would prevent someone from exercising his or her associational rights) (internal quotation marks omitted).

The cases of *Healy v. James*, 408 U.S. 169 (1972), and *Tabbaa, supra*, cited by Plaintiff in support of its freedom of association claims, are clearly distinguishable. In *Healy*, the Supreme Court held that a college's denial of official recognition to a student organization

constituted a substantial burden on association. 408 U.S. at 183. Here, Defendants took no action like the college in *Healy* that directly impacted the NRA's right to meet with its members for expressive association. In *Tabbaa*, the Second Circuit held that the "plaintiffs suffered a significant penalty, or disability, solely by virtue of associating at the [Reviving the Islamic Spirit] Conference" because they were detained for lengthy periods of time, interrogated, fingerprinted, and photographed when others, who had not attended the conference, did not have to endure these measures. *Tabbaa*, 509 F.3d at 102. Here, there are no allegations that Defendants imposed a penalty upon NRA members who participated in NRA advocacy events. Similarly, there are no plausible allegations that the Defendants imposed a penalty upon the NRA for associating with its members for Second Amendment advocacy purposes. While the NRA argues that the Consent Orders were the result of speech-motivated regulatory decisions, the Consent Orders indicate that Chubb and Stockton agreed that their conduct related to NRA insurance programs violated New York insurance law. The fact that these insurance companies agreed that *their* conduct violated New York law does not support a plausible claim that the Defendants imposed a penalty upon the NRA for associating with its members. *See e.g. Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986) (The "First Amendment is not implicated by the enforcement of laws directed at unlawful conduct having nothing to do with . . . expressive activity."). Further, the Lockton Consent Order provides that "Lockton may assist the NRA in procuring insurance

for the NRA's own corporate operations," Dkt. No. 37-4 at ¶ 43, and the Chubb Consent Order provides that "the NRA may itself purchase insurance from Chubb for the sole purpose of obtaining insurance for the NRA's own corporate operations." Dkt. No. 37-5 at ¶ 22. These two clauses undermine the NRA's claim that DFS intended to coerce insurers and banks into not doing business with the NRA and thereby penalized the NRA.

The allegations in the Amended Complaint are, at most, that the Defendants' actions "make it more difficult" for the NRA "to exercise [its] freedom of association" through NRA activities, but "did not prevent [the NRA] . . . from associating [with its members] nor burden in any significant manner [its] ability to do so." *Fighting Finest*, 95 F.3d at 228. This fails to state plausible freedom-of-association claims. Accordingly, Defendants' motion directed to Count Three is granted. If Plaintiff seeks leave to amend this claim, it should be done through a formal Rule 15 motion.[12]

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[12] At the end of the NRA's brief, it generically asks that if any claims are dismissed, it be given leave to amend. Pl. Mem. L., at 48. But without providing proposed factual allegations that would support legally plausible freedom-of-association claims, the Court is unable to determine whether to grant such leave. *See Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 119 (2d Cir. 2012) ("In assessing whether the proposed complaint states a claim, we consider the proposed amendments along with the remainder of the complaint, accept as true all non-conclusory factual allegations therein, and draw all reasonable inferences in plaintiff's favor to determine whether the allegations plausibly give rise to an entitlement to relief.") (interior quotation marks, alterations, and citations omitted); *Johnson v. City of New York*,

d. Equal Protection

Count Four alleges that Defendants engaged in selective enforcement of the New York insurance laws in violation of the NRA's rights to equal protection of law as secured by the Fourteenth Amendment to the United States Constitution, and by Article 1, Section 11 of the New York Constitution. Am. Compl. ¶¶ 108-113. In this regard, the NRA alleges that Defendants "knowingly and willfully violated the NRA's equal protection rights by seeking to selectively enforce certain provisions of the Insurance Law against Lockton's affinity-insurance programs for the NRA. Meanwhile, other affinity-insurance programs that were identically (or at least similarly) marketed by Lockton, but not endorsed by 'gun promotion' organizations, have not been targeted by DFS's investigation." *Id.* at ¶ 107. Plaintiff further contends that "Defendants' selective enforcement of the Insurance Law against the NRA and its business partners is based on the NRA's political views and speech relating to the Second Amendment." *Id.* ¶ 110. Plaintiff maintains that "Defendants' actions have resulted in significant damages to the NRA, including but not limited to damages due to reputational harm, increased development and marketing costs for any potential new NRA-endorsed insurance programs, and lost royalty amounts owed to the NRA."

No. 16-CV-6426 (KAM)(VMS), 2018 WL 5282874, at *4 (E.D.N.Y. Oct. 24, 2018) ("A party seeking leave to amend under Rule 15 must establish that amendment is not futile, is not the product of undue delay or bad faith, and would not overly prejudice the nonmovant.") (interior quotation marks and citations omitted).

Id. ¶ 111. Plaintiff seeks (a) "an order preliminarily and permanently enjoining Cuomo and Vullo (in their official capacities) and DFS . . . from selectively enforcing the Insurance Law by requiring Lockton or Chubb, through their respective consent orders, to forbear from doing business with the NRA which they could otherwise permissibly conduct with other affinity organizations," *id.* ¶ 113; (b) an injunction to enjoin Defendants "from further selective enforcement of the Insurance Laws to the NRA endorsed policies," *id.*, p. 44 ("Request for Relief"), ¶ a(3); and (c) monetary damages. *Id.* ¶ c.

Defendants argue that Plaintiff fails to allege facts supporting standing for selective enforcement equal protection claims because the Amended Complaint alleges that DFS "selectively" enforced the New York Insurance Law against Lockton and Chubb, but "does not allege that DFS has taken any enforcement action against the NRA at all." Def. Mem. L. at 39 (citing Am. Compl. at ¶¶ 54-64, 107-113).[13] Defendants maintain that the Court should not allow the NRA "to attempt a collateral attack on the Consent Orders, to which they are not a party, and to which the parties voluntarily

[13] Defendants note in two footnotes, however, that the NRA is under investigation for unlicensed insurance activities. Def. Mem. L., at 38, n. 16 ("While the NRA is under investigation for its unlicensed insurance activities and other violations of the Insurance Law, that investigation is ongoing and has not, to date, resulted in any enforcement action against the NRA."); *id.* at 39, n. 17 ("It should be noted that, while the NRA's own violations of the Insurance Law are under investigation by DFS, no enforcement action has yet been taken against it.").

waived any objection or challenge." *Id.* They argue that to do so would be improper "under the established law of standing," and "would hamper the current and future law enforcement efforts of DFS, by casting a shadow over the finality that regulated parties obtain when they enter into consent orders." *Id.* Plaintiff counters that it has standing to bring these claims because, "[b]y prohibiting Lockton and Chubb from engaging in lawful insurance business with the NRA, Defendants have selectively enforced the State's insurance laws against the NRA, not just against Lockton and Chubb." Pl. Mem. L. at 25.

1. Standing

"A complaint must contain specific allegations that 'plausibly suggest [Plaintiff has] standing to sue.'" *Ctr. for Bio-Ethical Reform, Inc. v. Black*, 234 F. Supp. 3d 423, 431 (W.D.N.Y. 2017) (quoting *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011)). "And because standing is essential to a court's power to entertain suit, courts must refrain from drawing inferences to find standing." *Id.* (citing *Atlantic Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd.*, 968 F.2d 196, 198 (2d Cir. 1992)). At the pleading stage, a plaintiff must "clearly allege facts demonstrating each element" of standing. *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016). "[A] plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 185 (2000); *see Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir.

2011) (Standing must be demonstrated "for each claim and form of relief sought.").

Article III of the United States Constitution limits the jurisdiction of federal courts to "Cases" or "Controversies." U.S. Const. art. III, § 2. "The purpose of Article III is to limit federal judicial power 'to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.'" *Montesa v. Schwartz*, 836 F.3d 176, 195 (2d Cir. 2016) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472(1982)). Standing is a doctrine rooted in the traditional understanding of the case-or-controversy limitation on federal judicial power. *Burgin v. Brown*, No. 15-CV-201S, 2018 WL 1932598, at *4 (W.D.N.Y. Apr. 24, 2018) (citing *Spokeo*, 136 S. Ct. at 1547). "As recently explained in *Spokeo*, constitutional standing developed 'to ensure that federal courts do not exceed their authority as it has been traditionally understood' by limiting 'the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong.'" *Id.* (quoting *Spokeo*, 136 S. Ct. at 1547).

The "irreducible constitutional minimum" of standing requires Plaintiff to show three elements: 1) that it suffered an "injury in fact;" 2) a causal connection between the injury and the conduct of which Plaintiff complains; and 3) that it is likely rather than speculative that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504

U.S. 555, 560 (1992). To be sufficient for purposes of standing, an injury must be "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical[.]" *Lujan*, 504 U.S. at 560 (internal quotations, citations, and footnote omitted); *see Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014) ("The plaintiff must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision.") (citing *Lujan*, 504 U.S. at 560). A "concrete" injury is one that is "'de facto'[,] that is, it must actually exist . . . [it is] 'real' and not 'abstract,'" although an injury need not be tangible to be concrete. *Spokeo*, 136 S. Ct. at 1548. To be "particularized," an injury "must affect the plaintiff in a personal and individual way." *Id.* at n.1.

To have standing to seek injunctive relief, a plaintiff must establish a real or immediate threat of injury that is caused by the challenged conduct. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983); *see Cacchillo*, 638 F.3d at 404 (A plaintiff seeking injunctive relief "must show the three familiar elements of standing: injury in fact, causation, and redressability.") (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)); *Greene v. Gerber Prod. Co.*, 262 F. Supp. 3d 38, 54 (E.D.N.Y. 2017) ("'[T]o meet the constitutional minimum of standing' for injunctive relief, a plaintiff 'must carry the burden of establishing that [it] has sustained or is immediately in danger of sustaining some direct

injury as the result of the challenged official conduct.' ") (quoting *Shain v. Ellison*, 356 F.3d 211, 215 (2d Cir. 2004)); *see also Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 239 (2d Cir. 2016) ("Plaintiffs lack standing to pursue injunctive relief where they are unable to establish a real or immediate threat of injury.") (interior quotation marks and citations omitted). Thus, to obtain an injunction, Plaintiff "must show, *inter alia*, 'a sufficient likelihood that [it] will again be wronged" in a way similar to the way it has already been wronged. *Marcavage v. City of New York*, 689 F.3d 98, 103 (2d Cir. 2012) (quoting *Lyons*, 461 U.S. at 111). The Supreme Court has "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient.' " *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)) (emphasis added in *Clapper*); *see Pungitore v. Barbera*, 506 Fed. Appx. 40, 41 (2d Cir. 2012) ("[W]hen seeking prospective injunctive relief, the plaintiff must prove the likelihood of future or continuing harm."); *Burgin*, 2018 WL 1932598, at *5 ("For prospective relief, 'a plaintiff must show a likelihood that he will be injured in the future,' and that the future injury is 'certainly impending, and real and immediate.' ") (quoting *Carver v. City of N.Y.*, 621 F.3d 221, 228 (2d Cir. 2010) and *Lee v. Bd. of Governors of the Fed. Reserve Sys.*, 118 F.3d 905, 912 (2d Cir. 1997)). While past injuries may be relevant to the issue of whether future injury is impending, and may support a claim for monetary damages, "such evidence 'does not in itself show a present case or controversy regarding

injunctive relief . . . if unaccompanied by any continuing, present adverse effects.'" *Pungitore*, 506 Fed. Appx. at 42 (quoting *Lyons*, 461 U.S. at 102)); *see Casey v. Odwalla, Inc.*, No. 17-CV-2148 (NSR), 2018 WL 4500877, at *9 (S.D.N.Y. Sept. 19, 2018) ("Although 'past injuries' can support a claim for 'money damages,' a party cannot rely on past injury alone to provide a basis for standing to seek injunctive relief.") (citing *Nicosia*, 834 F.3d at 239; *Shain v. Ellison*, 356 F.3d 211, 215 (2d Cir. 2004); *Deshawn E. ex rel. Charlotte E. v. Safir*, 156 F.3d 340, 344 (2d Cir. 1998)). Rather, to establish a certainly impending future injury, a plaintiff must show "'how [it] will be injured prospectively and that the injury would be prevented by the equitable relief sought.'" *Greene v. Gerber Prod. Co.*, 262 F. Supp. 3d 38, 54–55 (E.D.N.Y. 2017) (quoting *Marcavage*, 689 F.3d at 103 (collecting cases)).

In addition to constitutional standing, there is a prudential branch of standing "which embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'" *Montesa*, 836 F.3d at 195 (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) *abrogated on other grounds by Lexmark*, 134 S. Ct. at 1387). Prudential standing acts as a limitation on constitutional standing and consists of "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Lexmark Int'l*, 572 U.S.

at 126 (internal quotation marks and citations omitted).

To satisfy prudential standing, a "plaintiff generally must assert [its] own legal rights and interests, and cannot rest [its] claim to relief on the rights or interests of third parties." *Warth*, 422 U.S. at 499. "Though this limitation is not dictated by the Article III case or controversy requirement, the third-party standing doctrine has been considered a valuable prudential limitation, self-imposed by the federal courts." *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 643 (2d Cir. 1988). The Supreme Court articulated two important policies justifying this limitation: "first, the courts should not adjudicate [third-party] rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. Second, third parties themselves usually will be the best proponents of their own rights." *Singleton v. Wulff*, 428 U.S. 106, 113–14 (1976) (citations omitted).

"Although the Supreme Court has 'adhered to the rule that a party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties,' this rule is not absolute, and 'there may be circumstances where it is necessary to grant a third party standing to assert the rights of another.'" *Greene*, 262 F. Supp. 3d at 55 (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 129–30 (2004) (internal quotation marks and citation omitted)). "These circumstances are 'well-recognized,

prudential exceptions to the injury-in-fact requirement' that 'permit third-party standing where the plaintiff can demonstrate (1) a close relationship to the injured party and (2) a barrier to the injured party's ability to assert its own interests.'" *Id.* (quoting *W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100, 109–10 (2d Cir. 2008)); *see also Powers v. Ohio*, 499 U.S. 400, 410-11 (1991) (A plaintiff can assert claims on behalf of a third party if three criteria are met: "[1] the litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; [2] the litigant must have a close relation to the third party; and [3] there must exist some hindrance to the third party's ability to protect his or her own interests.") (citation omitted); *Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp.*, 418 F.3d 168, 174 (2d Cir. 2005) ("[A] plaintiff seeking third-party standing in federal court must . . . demonstrat[e] a close relation to the injured third party and a hindrance to that party's ability to protect its own interests." (internal quotation marks omitted)).

2. Sought-After Injunction, Am. Compl. ¶ 113.

The NRA lacks standing for the injunction sought in paragraph 113. *See* Am. Compl. ¶ 113.[14] Plaintiff

[14] (Seeking "an order preliminarily and permanently enjoining Cuomo and Vullo (in their official capacities) and DFS . . . from selectively enforcing the Insurance Law by requiring Lockton or Chubb, through their respective consent orders, to forbear

fails to allege facts clearly demonstrating a sufficient likelihood that it will again be wronged in a manner similar to the way it was harmed by entry of the Lockton and Chubb Consent Orders. The Consent Orders were entered following a DFS investigation yielding admissions from Lockton and Chubb that they were involved in numerous illegal insurance activities related to NRA programs. The NRA has not alleged that these activities were legal under New York law, or that the applicable New York insurance laws are unconstitutional or were improperly applied. Thus, there are insufficient allegations supporting a plausible contention that all of the NRA's past damages will be, or could be, repeated. To the extent the NRA alleges that it was harmed by provisions of the Consent Orders that prohibit Lockton and Chubb from participating with the NRA to offer legal affinity insurance programs, Plaintiff fails to allege facts plausibly indicating that, if the injunction was granted, either Lockton or Chubb would agree to participate in these programs in the future. Further, nothing in the Lockton or Chubb Consent Orders prohibits other insurance companies from participating in these services, yet Plaintiff has not alleged that another insurance company is planning to participate in NRA-endorsed affinity insurance programs. Thus, the "threatened injury" occasioned by the Consent Orders is not "*certainly impending*," but rather is, at most, "a *possible* future injury." *Clapper*, 568 U.S. at 409. This is

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from doing business with the NRA which they could otherwise permissibly conduct with other affinity organizations.").

insufficient to confer constitutional standing for the injunction sough in paragraph 113.

Further, Plaintiff fails to satisfy prudential standing for this relief, which seeks to enjoin Defendants from enforcing the Lockton and Chubb Consent Orders. This requested injunctive relief is, essentially, a third-party challenge to the stipulated settlements contained in those Consent Orders. It relies upon the rights and interests of Lockton and Chubb to resolve claims against those parties. Lockton and Chubb may not desire to vacate their consent agreements and/or do business with the NRA related to affinity insurance programs, and even if they wanted to do both, those are matters that should be advocated by Stockton and Chubb - not the NRA. Moreover, Plaintiff has not alleged facts plausibly indicting that either Lockton or Chubb are hindered in some manner in asserting their rights affected by the Consent Orders.

The cases cited by Plaintiff for the proposition that "a plaintiff has standing to challenge laws enforced against another party where the plaintiff is injured by such enforcement," Pl. Mem. L. at 26,[15] are misplaced. While these cases stand for the cited proposition, they do reach the issue raised by the injunction sought in paragraph 113 – that is, whether a plaintiff can vacate an agreement reached by a third party following

[15] (citing *Doe v. Bolton*, 410 U.S. 179, 187–89 (1973); *H.L. v. Matheson*, 450 U.S. 398, 400–01, 405–07 (1981); *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 753, 757 (1976); *NRA v. ATF*, 700 F.3d 185, 191–92 (5th Cir. 2012); *Dearth v. Holder*, 641 F.3d 499, 502 (D.C. Cir. 2011)).

enforcement of a challenged law. Here, prudential considerations limit Plaintiff's ability to challenge third-party agreements having only a consequential affect on Plaintiff. *See e.g. Hillside Metro Assocs., LLC v. JPMorgan Chase Bank, Nat. Ass'n*, 747 F.3d 44, 48–49 (2d Cir. 2014) ("We conclude that Hillside does not have prudential standing in this case because it cannot enforce the terms of the PAA, as to which it is neither a party nor a third-party beneficiary, but the enforcement of which is a necessary component of its claim."); *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103, 108 (2d Cir. 2009) (holding that a non-party to a contract lacks standing in a contract proceeding to enforce the agreement unless unequivocal terms clearly evidence an intent to permit such standing); *In re Motors Liquidation Co.*, 580 B.R. 319, 340 (Bankr. S.D.N.Y. 2018) ("In the context of a contract dispute, only parties to the contract and intended third-party beneficiaries of the contract have prudential standing to appear and enforce agreements."); *Tamir v. Bank of N.Y. Mellon*, 2013 WL 4522926, at *3 (E.D.N.Y. Aug. 27, 2013) (stating that "a non-party to a contract lacks standing to challenge an agreement in the absence of terms demonstrating that it is a third-party beneficiary").

Furthermore, the case of *Safelite Group, Inc. v. Rothman*, 229 F. Supp.3d 859 (D. Minn. 2017), cited by Plaintiff for the proposition that a party can challenge a consent order to which it was not a party, is distinguishable. In *Safelite*, the District of Minnesota found that the plaintiff had standing to challenge the

enforcement of a consent order entered between Auto Club Group, Inc. ("AAA"), a third-party insurer for whom Safelite served as claims administrator, and the Commissioner of the Minnesota Department of Commerce (DOC). Safelite challenged on First Amendment grounds the DOC's enforcement of a Minnesota statute that prohibits insurers from making statements that could pressure, coerce, or induce an insured to choose a particular glass vendor. *Safelite*, 229 F. Supp.3d at 866 (citing Minn. Stat. § 72A.201, subd. 6(14) (the Mandatory Advisory) and 6(16) (the Anti-Coercion Provision). The facts of the case indicate that "Safelite, in conjunction with the insurers for whom it provides claims administration services, develop[ed] scripts to use when insureds call to report an auto-glass claim." *Id.* The Consent Order was based on DOC's investigation finding that: (a) "[AAA's] glass administrator and its affiliated entities (collectively, "Safelite"), while administrating automobile glass claims, failed to provide the required advisory to insureds before recommending the use of [AAA's] network of preferred glass vendors;" and (b) "[AAA's] glass administrator Safelite, while administering automobile glass claims, advised that insureds may be balance billed[16] by non-preferred glass vendors," in violation of Minn. Stat. § 72A.201, subd. 6(14) and 6(16). *Safelite*, 229 F. Supp. 3d at 870. "In exchange for the DOC not pursuing an enforcement action against it, AAA agreed to drop Safelite as its

[16] "Balance billed" means the insured is billed for the difference between the amount paid by the insurer and total fee charged by the glass installer.

claims administrator in Minnesota and 'cease and desist from informing insureds they . . . may be balance-billed by non-preferred glass vendors, unless [AAA] [has] specific information proving the assertion(s) to be true for a certain vendor.' " *Id.* (quoting the Consent Order). Although the Consent Order "specifically address[ed] Safelite's suggestions that insureds 'may' be balance billed, . . . [t]he DOC never involved Safelite in its negotiations regarding the Consent Order . . . [and] Safelite did not learn about the Consent Order until weeks after it was executed." *Id.*

In finding that Safelite had standing to challenge the Consent Order, the District Court wrote:

> The Consent Order required that AAA drop Safelite as its claims administrator, undoubtedly causing economic "injury in fact" to Safelite. Moreover, the practical effect of the Consent Order is that Safelite must cease using any "may be balance billed" language if it wants to act as a claims administrator in Minnesota. The imminent threat of future prosecution and the self-censorship—or chilling effect—such a threat creates provides standing for as-applied First Amendment challenges. Safelite's commercial speech rights have thus been impaired by the Consent Order, giving it standing.
>
> Furthermore, as the DOC itself acknowledges, Safelite is the agent of AAA and the Consent Order had a "negative impact" on Safelite because of that relationship. Injury incurred indirectly, such as through an agency

> relationship, may still impart standing. The DOC's efforts to avoid "the elephant in the room" by going after Safelite's insurer-clients "one by one" do not deprive Safelite of standing to bring its First Amendment claim.

Id., at 875 (citations omitted).

Here, by contrast, the NRA has not challenged the New York insurance laws that Stockton and Chubb agreed they violated. There is also no plausible basis to conclude that enforcement of the New York insurance laws identified in the Chubb and Lockton Consent Orders would prevent another insurer from offering NRA lawful affinity insurance programs. Thus, unlike the Consent Order in *Safelite*, the Consent Orders here do not prevent the NRA from offering lawful affinity insurance programs to its members. While Defendants indicate that the NRA is under investigation for its unlicensed insurance activities, Def. Mem. L., at 38, n. 16; *id.* at 39, n. 17, the Amended Complaint fails to provide allegations plausibly suggesting that either Lockton or Chubb were in an agency relationship with the NRA such that the Consent Orders inhibit the NRA's ability to engage in lawful insurance activities. Simply stated, the Consent Orders address Lockton and Chubb's activities, and do not directly inhibit the NRA from engaging in lawful activities.

For the reasons discussed above, the Court finds that Plaintiff lacks standing for the injunctive relief requested in paragraph 113. Therefore, Defendants' motion to dismiss the equal protection selective enforcement claims is granted to the extent Plaintiff

seeks an order enjoining Gov. Cuomo, Supt. Vullo, and DFS from requiring Lockton and Chubb to abide by their respective Consent Orders. Because this standing deficiency is substantive and would not be cured by better pleading, *see Cusamano v. Sobek*, 604 F. Supp. 2d 416, 462 (N.D.N.Y. 2009) ("Of course, an opportunity to amend is not required where the problem with plaintiff's causes of action is substantive such that better pleading will not cure it.") (*Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) and *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991)) (interior quotation marks and brackets omitted), Plaintiff is denied leave to amend to challenge the Consent Orders on equal protection grounds.

3. Sought-After Injunction, Am. Compl. p. 44, ¶ a(3).

Plaintiff also seeks to enjoin Defendants "from further selective enforcement of the Insurance Laws to the NRA endorsed policies." Am. Compl. p. 44, ¶ a(3).[17] Like with the injunction sought in paragraph 113, Plaintiff fails to allege facts clearly demonstrating a sufficient likelihood that it will be injured in the future by selective enforcement of the New York insurance laws to lawful NRA-affinity insurance programs, or that such future injury is certainly impending, real, and immediate. Therefore, Defendants' motion to

[17] The Court notes that Plaintiff also seeks injunctive relief in relation to Counts 1, 2, 3, and 6. Because Defendants have not specifically challenged standing for injunctive relief related to these counts, the Court offers no opinion on the subject.

dismiss the equal protection selective enforcement claims is granted to the extent Plaintiff seeks an order enjoining Defendants from selectively enforcing the New York insurance laws against the NRA. Because it is possible that Plaintiff could allege facts demonstrating future selective enforcement of the New York insurance laws to the NRA, or to lawful NRA-endorsed affinity programs, dismissal in this regard is without prejudice.

4. Monetary Damages, Am. Compl. p. 44, ¶ c

Plaintiff also seeks monetary recovery for Defendants' alleged selective enforcement. Defendants' challenge to the selective enforcement claims is addressed only to standing. Thus, the Court examines only whether Plaintiff has pled sufficient allegations to confer standing to seek monetary recovery. *See Burgin*, 2018 WL 1932598, at *5 ("When assessing constitutional standing, courts do not examine the merits of the claims, but rather, determine 'whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.'") (quoting *Warth*, 422 U.S. at 498-99); *see also Montesa*, 836 F.3d at 195 (In determining whether a party has standing, the focus is on "'the party seeking to invoke federal jurisdiction, rather than the justiciability of the issue at stake in the litigation.'") (quoting *Fulani v. Bentsen*, 35 F.3d 49, 51 (2d Cir.1994)). The Court finds that it has.

First, the Amended Complaint alleges that the NRA suffered concrete and particularized injury by, among other things, losing royalty amounts owed to it under its contract with Lockton and experiencing increased costs associated with the potential development of new NRA-endorsed insurance programs not through Lockton, Chubb, or Lloyd's. *See* Am. Compl. at ¶ 111. It can also be presumed that Plaintiff suffered a sufficient injury-in-fact due to the alleged equal protection violations. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 262–63 (1977) (finding injury-in-fact based on alleged equal protection violations); *Doe v. Sch. Bd. of Ouachita Parish*, 274 F.3d 289, 292 (5th Cir. 2001) ("Impairments to constitutional rights are generally deemed adequate to support a finding of 'injury' for purposes of standing."); *accord Council of Ins. Agents & Brokers v. Molasky–Arman*, 522 F.3d 925, 931 (9th Cir. 2008) (same). Second, the Amended Complaint plausibly alleges that the NRA's injury would not have occurred but for Defendants' selective enforcement of certain New York insurance laws against the NRA's affinity insurance program and, through the Lockton Consent Order, termination of all affinity insurance programs and the NRA's business relationship with Lockton. *See id.* at ¶¶ 108-111. This satisfies the second *Lujan* element. Third, the alleged past harm provides a sufficient basis for monetary damages. *See Casey*, 2018 WL 4500877, at *9.

5. Conclusion - Selective Enforcement Claims

Accordingly, Defendants' motion to dismiss the equal protection selective enforcement claims is granted to the extent Plaintiff seeks an order enjoining Defendants from requiring Lockton and Chubb to abide by their respective Consent Orders, and enjoining Defendants from future New York Insurance Law enforcement actions. The motion is denied to the extent Plaintiff seeks to recover monetary damages for alleged past selective enforcement actions.

e. Due Process

Count Six alleges that Defendants violated the NRA's rights to due process as guaranteed by the Fourteenth Amendment of the United States Constitution and Article 1, Section 6 of the New York Constitution. Am. Compl. ¶¶ 121-132. Plaintiff argues that it has adequately pled two distinct due process claims - deprivation of its liberty interest "in its good name, reputation, honor, integrity, and its ability to endorse insurance products to its membership," *id.* ¶ 125, and deprivation of its property interest in its agreements with financial institutions and insurance companies to provide the NRA with banking services and insurance coverage. *Id.* ¶¶ 125-126; *see also* Pl. Mem. L., at 28;[18]

[18] ("The NRA adequately pleads two distinct claims under the Due Process Clause of the Fourteenth Amendment. First, Defendants violated the Due Process Clause by stigmatizing the NRA in the course of instructing financial institutions to cease doing business with the NRA. Second, Defendants violated the

Trans. of Oral Arg., at p. 44.[19] For the reasons that follow, these claims are dismissed.

1. Stigma-Plus Claim

The Fourteenth Amendment's Due Process Clause[20] prohibits a state actor from depriving a citizen of her life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1. "A person's interest in his or her good reputation alone, apart from a more tangible interest, is not a liberty or property interest sufficient to invoke the procedural protections of the Due Process Clause to create a cause of action under § 1983." *Patterson v. City of Utica*, 370 F.3d 322, 329–30 (2d Cir. 2004) (citing *Paul v. Davis*, 424 U.S. 693, 701 (1976)). "Loss of one's reputation can, however, invoke the protections of the Due Process Clause if that loss is coupled with the deprivation of a more tangible interest." *Id.* at 330 (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572–73 (1972)). Referred to as a "stigma-plus" claim, it involves "'injury to one's reputation (the stigma) coupled with the deprivation of

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NRA's due process rights when they coerced Lockton and Chubb to end their relationships with the NRA without affording the NRA any procedural protections.")

[19] ("I would like to address now the due process claim. So the NRA alleges two separate due process claims, stigma plus and the deprivation of contract rights without due process of law.")

[20] Due process claims under the New York State Constitution similar to those alleged here are subject to the same analysis as federal due process claims. *Gilmore v. Bouboulis*, No. 3:15-CV-0686 (GTS/DEP), 2016 U.S. Dist. LEXIS 115315, **35-36, n. 7 (N.D.N.Y. Aug. 29 2016).

some 'tangible interest' or property right (the plus), without adequate process.'" *LoPorto v. County of Rensselaer*, 115CV0866LEKDJS, 2018 WL 4565768, at *15 (N.D.N.Y. Sept. 24, 2018) (quoting *DiBlasio v. Novello*, 344 F.3d 292, 302 (2d Cir. 2003)). To prevail on such a claim, Plaintiff must show "'(1) [stigma—] the utterance of a statement sufficiently derogatory to injure [plaintiff's] reputation, that is capable of being proved false, and that he or she claims is false, and (2) [a plus—] a material state-imposed burden or state-imposed alteration of the plaintiff's status or rights.'" *Paterno v. City of New York*, No. 17 CIV. 8278 (LGS), 2018 WL 3632526, at *3 (S.D.N.Y. July 31, 2018) (quoting *Vega v. Lantz*, 596 F.3d 77, 81 (2d Cir. 2010) (internal punctuation omitted)).

"In order to survive a motion to dismiss on a 'stigma-plus' claim, the complaint must plead the particulars of a 'statement sufficiently derogatory to injure' the plaintiff's reputation; not merely general characterizations or summaries of those statements." *Id.*, at *4 (quoting *Vega*, 596 F.3d at 81). Courts look to state substantive law of defamation in analyzing the "stigma" component of a "stigma-plus" claim. *Id.* (citing *Sharpe v. City of New York*, No. 11 Civ. 5494, 2013 WL 2356063, at *6 n. 10 (E.D.N.Y. May 29, 2013), *aff'd*, 560 Fed. Appx. 78 (2d Cir. 2014) ("federal courts in New York often look to New York defamation law when analyzing a "stigma-plus" claim."). "The gravamen of 'stigma' as part of a due process violation is the making under color of law of a reputation-tarnishing statement that is false." *Doe v. Dep't of Pub. Safety ex rel.*

Lee, 271 F.3d 38, 47–48 (2d Cir. 2001)*, rev'd on other grounds Conn. Dep't of Public Safety v. Doe*, 538 U.S. 1 (2003).

The Amended Complaint asserts that "Defendants, in their April 2018 Letters and in other public pronouncements, have made stigmatizing statements, including that the NRA represents a potential reputation risk to insurance companies and financial institutions, that the NRA is responsible for 'senseless violence,' and that the NRA is a threat to the public health and safety, that call into question the NRA's good name, reputation, honor, and integrity. These stigmatizing statements are false and capable of being proved false." Am. Compl. ¶ 127. In support of these claims, Plaintiff argues that "Defendants publicly branded the NRA a 'reputational risk' to the safety and soundness of financial institutions, warned those financial institutions that having the NRA as a customer may send the 'wrong message to their clients and their communities,' insinuated that having 'ties' to the NRA 'jeopardize[s] public safety,' stated that the NRA has 'caused carnage in this nation,' and urged them to drop the NRA in order to 'promote public health and safety.' " Pl. Mem. L. at 29 (citing Dkt. 37-1 (Cuomo Press Release); Am. Compl. at ¶ 45 (referencing the Guidance Letters); Gase Decl., Ex. D). These statements fail to satisfy the "stigma" component of the stigma-plus claims.

The statements in the Cuomo Press Release and the Guidance Letters are purely government speech relaying New York's opinions about public safety, gun

regulation, and the role that insurance companies and financial institutions play in shaping public opinion in this public debate. Whether the NRA represents a potential reputational risk to insurance companies and financial institutions is clearly a matter of opinion. Further, the Guidance Letters do not state that the NRA is responsible for senseless violence. Rather, they state that there is a "social backlash against [the NRA] and similar organizations that promote guns that lead to senseless violence," and then go on to state that "the nature and the intensity of the voices now speaking out . . . is a strong reminder that such voices can no longer be ignored and that society, as a whole, has a responsibility to act and is no longer willing to stand by and wait and witness more tragedies caused by gun violence, but instead is demanding change now." Dkt. # 37-2; *see* Dkt. # 37-3 (same). These statements express New York's opinion of societal views related to the availability of guns, of organizations that promote access to guns, and whether the availability of guns leads to senseless violence. No statement is made that the NRA directly causes violence, and any inference that the Guidance Letters imply that the NRA's gun promotion advocacy leads to violence is based on opinions articulated in the documents. Similarly, the Guidance Letters do not state that the NRA is a threat to public health and safety. Rather, they reference public health and safety in the context of the perceived role that insurance companies and financial institutions play in

shaping public opinion, *see* Dkt. # 37-2;[21] Dkt. # 37-3,[22] and encourage these entities "to continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations, if any, as well as continued assessment of compliance with their own codes of social responsibility." Dkt. # 37-2; Dkt. # 37-3. While the Guidance Letters encourage insurance companies and financial institutions "to review any relationships they have with the NRA or similar gun promotion organizations, and to take prompt actions to managing [their reputational risks] and promote public health and safety," Dkt. # 37-2; Dkt. # 37-3, they do not state that the NRA is a threat to the public health and safety. Any inference that the Guidance Letters imply that the NRA's gun promotion advocacy is contrary the public health and safety is based on the opinions expressed in these two documents.

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[21] ("Our insurers are, and have been, vital to the communities they serve for generations and are guided by their commitment to corporate social responsibility, including public safety and health. Insurers' engagement in communities they serve is closely tied to the business they do with their clients and customers and its impact on such communities. . . . Our insurers are key players in maintaining and improving public health and safety in the communities they serve.")

[22] ("Our financial institutions, whether depository or non-depository, are, and have been, the cornerstone of the communities they serve for generations and are guided by their commitment to corporate social responsibility, including public safety and health. . . . Our financial institutions can play a significant role in promoting public health and safety in the communities they serve, thereby fulfilling their corporate social responsibility to those communities.")

Likewise, the Cuomo Press Release is government speech relaying opinions about public safety, gun regulation, and the role that insurance companies and financial institutions play in shaping public opinion in this public debate. While the press release encourages insurers and bankers "to consider whether [their ties to the NRA or other similar organizations] harm their corporate reputations and jeopardize public safety," Dkt. # 37-1, it does not state that the NRA is responsible for violence, or that it jeopardizes public health and safety. Again, the statements are made in the context of a statement about gun violence in general, and asks the targeted entities to examine their connections to the NRA and other gun promotion organizations to determine for themselves whether continued association with gun promotion organizations harms their reputations and benefits the communities they serve. Any inference that the press release implies that the NRA promotes gun violence or is harmful to public safety is based only on the opinions expressed in the press release.

Thus, the statements in the Guidance Letters and Cuomo Press Release are not actionable on the stigma-plus claims because, as opinions, they are not "capable of being proved false." *Vega*, 596 F.3d at 81; *see*, *e.g.*, *Paterno*, 2018 WL 3632526, at *5 ("The first two statements—referencing 'a terrible chapter' and 'fundamental principles'—are not actionable because they are opinions, which are not 'capable of being proved false.'") (citing *Vega*, 596 F.3d at 81; *Sharpe*, 2013 WL 2356063, at *6 ("a statement of opinion, rather than

fact . . . is not actionable as a stigmatizing remark."); *Wiese v. Kelley*, No. 08 Civ. 6348, 2009 WL 2902513, at *6 (S.D.N.Y. Sept. 10, 2009) ("The Attorney General's description of the conduct resulting in the loss of data as 'extremely troubling' is a statement of opinion, rather than fact, and as such is not actionable as a stigmatizing remark.")); *cf. Enigma Software Grp. USA, LLC v. Bleeping Computer LLC*, 194 F.Supp.3d 263, 281 (S.D.N.Y. 2016) ("'New York law absolutely protects statements of pure opinion, such that they can never be defamatory.'"); *Sorvillo v. St. Francis Prep. Sch.*, No. 13-CV-3357 (SJ/MDG), 2014 U.S. Dist LEXIS 186923, **12-13 (E.D.N.Y. Aug. 12, 2014) (granting motion to dismiss because alleged statements were opinions); *Apionishev v. Columbia Univ. in City of New York*, No. 09 Civ. 6471, 2012 WL 208998, at *10 (S.D.N.Y. Jan. 23, 2012) (dismissing a libel claim, because "[e]xpressions of opinion are not actionable").

Plaintiff does not specifically point to Gov. Cuomo's April 20, 2018 tweet in support of the stigma-plus claim. Nonetheless, Gov. Cuomo's statement that the "[t]he NRA is an extremist organization" is clearly an expression of his opinion and, therefore, is insufficient to support the first element of the stigma-plus claim.

Plaintiff's reference to a statement that the NRA has "caused carnage in this nation" is from a transcript of Gov. Cuomo's August 6, 2018 guest appearance on CNN's *New Day with Allisyn Camerota and John Berman*. Gase Decl., Ex. D. Because the transcript is not attached to the Amended Complaint or referenced

therein, and because the matter is before the Court on a Rule 12(b)(6) motion, Gov. Cuomo's statements while on CNN cannot properly be considered in determining whether Plaintiff states a plausible stigma-plus claim. Nevertheless, because Plaintiff requests leave to amend if a claim is dismissed, the Court reviews the transcript to determine whether adding the "caused carnage" statement would provide an actionable stigmatizing statement. In the transcript, Gov. Cuomo is quoted as stating:

> [The NRA is] making a different point, which is, I have been a longtime opponent of the NRA, I plead guilty. I believe the NRA represents an extremist group. I believe they've been counterproductive for gun owners in this country. I believe their politics seeks them [*sic*] to stop any common sense gun reform because then, John, they would be out of business. Most gun owners support some type of reasonable gun control. 90 percent of Americans support background checks. The NRA has always been against any progress whatsoever. They're oblivious to the facts. They've caused carnage in this nation. They've done gun owners a disservice because there is a common sense compromise if the NRA wasn't always threatening politicians who went anywhere near reasonableness. If you remember President Trump after the Parkland shooting, spoke in the White House conference room and asked reasonable questions. He seemed reasonable. "Why can't we raise the purchase age? Why can't we raise the age for assault

> weapons?" He met with the NRA and did a total 180 the next day and was absolutely against any reform, and this nation still has done nothing on guns.

Gase Decl., Ex. D, p. 3.

Read in context, Gov. Cuomo's "caused carnage" statement is clearly an expression of his, or New York's, opinion as to the connection between the NRA's political positions and the numerous incidents of mass shootings in the Country. For the reasons just discussed, such an opinion does not support a plausible stigma-plus claim. Therefore, leave to amend to add this statement is denied.

Plaintiff also does not point to the alleged "backroom exhortations [made] during the DFS Investigation" to support its stigma-plus claim. *See* Am. Compl. ¶ 127 ("Defendants, in their April 2018 Letters *and in other public pronouncements*, have made stigmatizing statements. . . .") (emphasis added); *see also id.* ¶ 126 (referencing these backroom statements in support of the property deprivation claim). Even if it did, however, Plaintiff has not pled the particulars of these statements such to allow a determination whether the statements are "sufficiently derogatory to injure the plaintiff's reputation" and capable of being proved false. *See Vega*, 596 F.3d at 81; *Paterno*, 2018 WL 3632526, at *4. Thus, this conclusory allegation provides an insufficient basis to avoid dismissal of the stigma-plus claims. *See*, *e.g.*, *Filteau v. Prudenti*, 161 F. Supp.3d 284, 293 (S.D.N.Y. 2016) (dismissing a

"stigma-plus" complaint where the allegations of "stigma" were "conclusory and speculative"); *Miley v. Hous. Auth. of City of, Bridgeport*, 926 F. Supp.2d 420, 432 (D. Conn. 2013) (dismissing a complaint where the "allegations are devoid of specific factual content to state a claim to relief for a stigma-plus violation that is plausible on its face"); *see also Moy v. Perez*, 712 F. App'x 38, 39 (2d Cir. 2017) ("[B]ald assertions and conclusions of law will not suffice to avoid dismissal, nor will factual allegations that are wholly conclusory[.]") (internal quotation marks and citations omitted).

Inasmuch as Plaintiff fails to point to statements plausibly supporting the first element of its stigma-plus due process claims, these claims are dismissed without prejudice.

2. Deprivation of Property Interest in Business Relationships

The Amended Complaint also alleges that "Defendants' actions have deprived the NRA of its constitutionally protected interests in engaging in core political advocacy and pursuing revenue opportunities free from unreasonable government interference by coercing financial institutions to cease providing essential services to the NRA and other 'gun promotion' organizations." Am. Compl. ¶ 122. Specifically, Plaintiff alleges that the NRA has a property interest in its agreements with financial institutions to provide the NRA with banking services and corporate insurance coverage, *id.* at ¶¶ 124-125, and that:

> Defendants' April 2018 Letters, backroom exhortations during the DFS Investigation, and public statements caused, at a minimum, Lockton Affinity, Lockton Companies, and Chubb to discontinue their NRA-endorsed insurance options in New York or (in Chubb's case) nationwide and to never again participate in such programs, thus depriving the NRA of its property interest without due process of law. Furthermore, Defendants' actions have interfered with and deprived the NRA of its tangible property interests in accessing banking and insurance products on equal terms with other citizens.

Id. ¶ 126. Plaintiff contends that Defendants' actions violate the NRA's substantive and procedural due process rights. Pl. Mem. L. at 31.

"In order to demonstrate a violation of either substantive or procedural due process rights, the plaintiff must first demonstrate the possession of a federally protected property right to the relief sought." *Donohue v. Cuomo*, No. 111CV1530MADCFH, 2018 WL 4565765, at *17 (N.D.N.Y. Sept. 24, 2018) (citations omitted). Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 577 (1972). "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings

that support his claim of entitlement to the benefit." *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (citing *Roth*, 408 U.S. at 577). However, "[t]he mere identification of a state law right does not necessarily require a finding that the right identified is protected by the Constitution." *Barnes v. Pilgrim Psychiatric Ctr.*, 860 F. Supp. 2d 194, 201 (E.D.N.Y. 2012). Rather, in order to have a protected property interest in a benefit, "a person clearly must have more than an abstract need for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577; *see Sindermann*, 408 U.S. at 603 (A mere subjective expectancy of receiving a benefit is not enough); *Local 342, Long Island Pub. Serv. Emp., UMD, ILA, AFL-CIO v. Town Bd. of the Town of Huntington*, 31 F.3d 1191, 1194 (2d Cir. 1994) ("In order for a person to have a property interest in a benefit such as the right to payment under a contract, [h]e must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.") (citations omitted). "When determining whether a plaintiff has a claim of entitlement, we focus on the applicable statute, contract or regulation that purports to establish the benefit." *Martz v. Vill. of Valley Stream*, 22 F.3d 26, 30 (2d Cir.1994).

Plaintiff asserts that it was deprived of its agreements with financial institutions and insurers to provide the NRA with banking services and corporate insurance coverage, and argues that "valid current contracts and goodwill are the exact type of property interests that courts routinely recognize qualify for

protection under the Due Process Clause." Pl. Mem. L., p. 31. However, the instant case is distinguishable from the cases Plaintiff cites to support this argument. *See id.*, at n. 161. In these cases, rules or mutually explicit understandings supported the plaintiffs' claims of entitlement to the benefits they were denied. *See Lynch v. United States*, 292 U.S. 571, 578-81 (1934) (Addressing plaintiffs' entitlement to enforce War Risk Insurance policies, through which the United States insured the lives of veterans, finding that "the due process clause prohibits the United States from annulling [the policies], unless . . . the action taken falls within the federal police power or some other paramount power."); *Branum v. Clark*, 927 F.2d 698, 705 (2d Cir. 1991) (Finding that a dematriculated graduate student had a procedural due process right to an unbiased hearing because New York law recognizes "an implied contract between [a college or university] and its students," requiring the "academic institution [to] act in good faith in its dealing with its students.") (interior quotation marks and citations omitted); *Ezekwo v. N.Y.C. Health & Hospitals Corp.*, 940 F.2d 775, 783 (2d Cir. 1991) (finding that a physician had a reasonable expectation of being appointed as the position of Chief Resident at a public hospital because the hospital had an established policy and practice, highlighted in its informational documents, of awarding the position of Chief Resident to all third year residents on a rotating basis, and because the plaintiff was verbally advised that she would be Chief Resident during a specific period of time and, in that position, would receive a salary differential). Here, by contrast, Plaintiff fails to allege

facts plausibly demonstrating that rules or mutually explicit understandings support its claim of entitlement to the benefit of doing business with various financial institutions or insurance companies.

"[W]hile the Supreme Court has recognized that '[t]he assets of a business (including its good will) unquestionably are property, and any state taking of those assets is unquestionably a 'deprivation' under the Fourteenth Amendment . . . business in the sense of the activity of doing business, or the activity of making a profit is not property in the ordinary sense.'" *Chrebet v. Cty. of Nassau*, 24 F. Supp. 3d 236, 245 (E.D.N.Y. 2014) (quoting *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999)), *aff'd sub nom. Chrebet v. Nassau Cty.*, 606 F. App'x 15 (2d Cir. 2015). Moreover,

> [d]ecisions by and within the Second Circuit indicate . . . that "the loss of a future business opportunity is not a protect[able] property interest." *Evac, LLC v. Pataki*, 89 F. Supp.2d 250, 258 (N.D.N.Y.2000) (citing *Asbestec Const. Servs., Inc. v. U.S. Envtl. Prot. Agency*, 849 F.2d 765, 770 (2d Cir.1988) ("Mere opportunity to obtain a federal contract is not a property right under the due process clause.")); *cf. Sanitation & Recycling Ind., Inc. v. City of New York*, 928 F.Supp. 407, 420–21 (S.D.N.Y.1996), *aff'd*, 107 F.3d 985 (2d Cir.1997) (right to continue business on same terms as in the past is not a protectable property interest under the Due Process Clause). Furthermore, decisions within this Circuit

> indicate that allegations of harm to a plaintiff's "business operations" may not form the basis of a due process claim. *Murtaugh v. New York*, 810 F. Supp.2d 446, 480 (N.D.N.Y. 2011) (finding that plaintiff's claim that defendants' actions effectively harmed plaintiff's business operations did not implicate a property interest for the purposes of a due process claim); *Tuchman v. Conn.*, 185 F.Supp.2d 169, 174 (D. Conn. 2002) (finding that harm to "ability to conduct business" was not a deprivation of due process).

Id., at 245–46.

Plaintiff's allegations establish, at most, that it has "an abstract need for" and "a unilateral expectation" of receiving the business services from the institutions that have severed ties, or refused to associate, with the NRA. This includes Lockton and Chubb, who agreed to refrain from offering insurance services to Plaintiff, including programs that violated New York insurance law. Because Plaintiff does not present facts plausibly demonstrating that it has an entitlement to enter agreements with, or received services from, the financial institutions and insurance companies that have denied it services, it does not have a constitutionally protected property interest in its agreements with these entities. *See e.g.*, *id.* at 246 ("In keeping with Second Circuit precedent, the Court will not recognize a protectable property interest in plaintiff's right to conduct his business and earn future profits from that business."). Therefore, the property deprivation due process claims are dismissed. Because the deficiency

with these claims is substantive and cannot be cure with better pleading, leave to amend the property deprivations due process claims is denied.

f. Conspiracy

Count Five alleges claims against Gov. Cuomo and Supt. Vullo in their individual capacities, brought pursuant to 42 U.S.C. § 1983, asserting that they "agreed with each other, and with others known and unknown, to deprive the NRA of rights secured and guaranteed by the First and Fourteenth Amendments to the United States Constitution and Sections Eight and Eleven of the New York Constitution." Am. Compl. ¶ 115; *see id.* ¶¶ 114-120. Defendants contend the claims must be dismissed because the Amended Complaint contains only conclusory allegations of a conspiracy. Def. Mem. L., pp. 40-41. The Court agrees.

A § 1983 conspiracy claim requires "(1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." *Pangburn v. Culbertson*, 200 F.3d 65, 72 (2d Cir. 1999); *see also Ciambriello v. Cty. of Nassau*, 292 F.3d 307, 324–25 (2d Cir. 2002) (same); *Galgano v. County of Putnam, N.Y.*, No. 16-CV-3572 (KMK), 2018 WL 4757968, at *32 (S.D.N.Y. Sept. 28, 2018) (same). "[C]onspiracies are by their very nature secretive operations, and may have to be proven by circumstantial, rather than direct, evidence." *Pangburn*, 200 F.3d at 72 (internal

quotation marks omitted). However, to state a viable conspiracy claim, Plaintiff " 'must provide some factual basis supporting a meeting of the minds' " of the alleged conspirators to carry out the unlawful plan. *Galgano*, 2018 WL 4757968, at *32 (quoting *Webb v. Goord*, 340 F.3d 105, 110 (2d Cir. 2003) (internal quotation marks omitted)). "Thus, Plaintiff must 'make an effort to provide some details of time and place and the alleged effects of the conspiracy . . . [including] facts to demonstrate that the defendants entered into an agreement, express or tacit, to achieve the unlawful end.' " *Id.* (quoting *Warren v. Fischl*, 33 F. Supp. 2d 171, 177 (E.D.N.Y. 1999) (citations and internal quotation marks omitted)). To avoid dismissal, Plaintiff must allege " 'facts upon which it may be plausibly inferred that [Gov. Cuomo and Supt. Vullo] came to an agreement to violate [Plaintiff's] constitutional rights.' " *LoPorto*, 2018 WL 4565768, at *13 (quoting *Green v. McLaughlin*, 480 F. App'x 44, 46 (2d Cir. 2012) (citation omitted)); *see Phillips v. County of Orange*, 894 F. Supp. 2d 345, 383–84 (S.D.N.Y. 2012) ("Allegations of conspiracy must allege with at least some degree of particularity overt acts which defendants engaged in which were reasonably related to the promotion of the alleged conspiracy.") (internal quotation marks and citation omitted). "[C]omplaints containing only conclusory, vague, or general allegations that the defendants have engaged in a conspiracy to deprive the plaintiff of [its] constitutional rights are properly dismissed; diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct."

Ciambriello, 292 F.3d at 325 (internal quotation marks omitted).

The allegations in Count Five are that Gov. Cuomo directed Supt. Vullo to issue the Guidance Letters "implicitly threatening DFS-regulated entities with potential prosecutorial action should they fail to sever ties with the NRA," Am. Compl. ¶ 116, and that Supt. Vullo "agreed to issue" the Guidance Letters "in an apparent effort to silence, intimidate, and deter those possessing a particular viewpoint from participating in the debate with respect to gun control." *Id.* ¶ 118. Plaintiff also alleges that Supt. Vullo signed the Consent Orders "to carry out her agreement with Cuomo to stifle the NRA's political speech." *Id.* ¶ 117. These allegations are insufficient to support plausible Section 1983 conspiracy claims.

The Guidance Letters, by themselves, constitute purely political speech. While these letters, when viewed in the context of Defendants' other actions, may provide some inference supporting First Amendment freedom of speech and Fourteenth Amendment equal protection claims, Plaintiff provides insufficient factual allegations supporting the conclusion that Gov. Cuomo and Supt. Vullo reached an agreement to violate the NRA's constitutional rights, or had a meeting of minds to issue these letters to carry out such a plan. *See Hutchins v. Solomon*, No. 16-CV-10029 (KMK), 2018 WL 4757970, at *26 (S.D.N.Y. Sept. 29, 2018) ("Plaintiff neither properly alleges the required existence of an agreement, nor the required meeting of the minds, between [Defendants]."); *see also Baines v. City*

of New York, No. 10-CV-9545, 2015 WL 3555758, at *12 (S.D.N.Y. June 8, 2015) ("Although [the] [p]laintiff repeatedly asserts that [the] [d]efendants entered an agreement to violate his civil rights . . . , the [complaint] is devoid of facts that would render that allegation plausible as opposed to merely conceivable." (citation omitted)). The fact that Supt. Vullo issued the Guidance Letters at Gov. Cuomo's direction is insufficient to plausibly establish that the two agreed to violate the NRA's constitutional rights and attempted to carry out the plan by issuing the Guidance Letters. *See Morales v. City of New York*, 752 F.3d 234, 237 (2d Cir. 2014) (finding claims that defendants worked together insufficient to suggest an improper motive); *Beechwood Restorative Care Center v. Leeds*, 436 F.3d 147, 154 (2d Cir. 2006) (finding that the fact that government employees from various federal and state agencies cooperated does not, without more, prove they conspired to violate plaintiff's rights); *Scotto v. Almenas*, 143 F.3d 105, 114–15 (2d Cir. 1998) (concluding that "several telephone calls and other communications" were not sufficient to show conspiracy); *Hutchins*, 2018 WL 4757970, at *26 ("The facts Plaintiff points to fail to do more than describe a group of police officers working on the same case and passing information on to a prosecutor. Plaintiff does not allege when or how any of the Defendants agreed to violate Plaintiff's rights, what the scope of the agreement was, or any other detail regarding the alleged agreement. Plaintiff thus fails to allege a factual basis supporting the existence of an agreement."); *Zahrey v. City of New York*, No. 98-CV-4546, 2009 WL 1024261, at *11 (S.D.N.Y. Apr. 15, 2009)

(dismissing conspiracy claim on summary judgment where the plaintiff "provide[d] no evidence, absent the fact that the [i]ndividual [d]efendants worked together, that . . . an agreement existed").

Further, there is a complete dearth of plausible factual allegations supporting the conclusion that Supt. Vullo signed the Consent Orders as a way to carry out a purported agreement she had with Gov. Cuomo to violate the NRA's constitutional rights. The Consent Orders were entered based on Lockton and Chubb's agreements that they violated New York insurance laws and were willing to pay substantial monetary penalties for their actions. These agreements were plainly entered to resolve enforcement actions directed at the admittedly unlawful insurance-related conduct by Lockton and Chubb. There is no plausible basis to conclude that Supt. Vullo signed the Consent Orders to carry out a purported plan she and Gov. Cuomo had to violate the NRA's constitutional rights, as opposed to signing these documents in her role as DFS Superintendent. *See Thomas v. Demeo*, No. 15-CV-9559, 2017 WL 3726759, at *12 (S.D.N.Y. Aug. 28, 2017) (dismissing § 1983 conspiracy claim because the complaint did not "provide even circumstantial allegations that the alleged conspiracy existed, much less any details as to the extent of the alleged agreement or how [the] [d]efendants collectively carried it out"); *Tavares v. New York City Health & Hosps. Corp.*, No. 13-CV-3148, 2015 WL 158863, at *7–8 (S.D.N.Y. Jan. 13, 2015) (dismissing a conspiracy claim where plaintiff failed to

"put forward any facts supporting the inference that the . . . [d]efendants acted in concert").

Equally unavailing are Plaintiff's contentions that the Amended Complaint "sets forth numerous factual allegations—supported by evidence—which demonstrate that Cuomo and Vullo reached an agreement to deprive the NRA of its rights under the Constitution and took overt acts to achieve that goal," and that it "extensively details the 'who,' 'what,' 'where,' and 'how' comprising Defendants' conspiracy." Pl. Mem. L. at 35 (citing Am. Compl. 34-35;[23] 46;[24] 50-51;[25] 54;[26] 62.[27] None of these allegations plausibly demonstrates an agreement between Gov. Cuomo and Supt. Vullo, or between either of these two and anyone else, to violate the NRA's constitutional rights. Accordingly,

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[23] (alleging that DFS launched an investigation into the Carry Guard program because the Everytown for Gun Safety ("Everytown") activist organization contacted the New York County District Attorney's Office ("DA's Office") about the Carry Guard program, the DA's office contacted DFS, and Everytown took credit for instigating the investigation)

[24] (alleging that Supt. Vullo issued the Guidance Letters)

[25] (alleging that Gov. Cuomo and Supt. Vullo issued the Cuomo Press Release, and that Gov. Cuomo issued his April 20, 2018 tweet)

[26] (alleging that Lockton entered its Consent Order, which restricts Lockton's participation in any NRA-endorsed insurance programs in New York State)

[27] (alleging that Chubb entered its Consent Order, which restricts Chubb's participation in any affinity-type insurance program with the NRA)

the conspiracy claims alleged in Count Five are dismissed without prejudice.

g. Tortious Interference With Prospective Economic Advantage

Count Seven asserts state law claims of tortious interference with prospective economic advantage against Gov. Cuomo and Supt. Vullo in their individual capacities. Am. Compl. ¶¶ 133-141. Plaintiff contends that Gov. Cuomo and Supt. Vullo interfered with the NRA's business relationship with Lockton by "convinc[ing] and induc[ing]" Lockton to enter a Consent Order, *id.* ¶ 138, that included provisions that Lockton would not participate in "any other NRA-endorsed programs with regard to New York State" and would not "enter into any agreement or program with the NRA to underwrite or participate in any affinity-type insurance program involving any line of insurance to be issued or delivered in New York State or to anyone known to Lockton to be a New York resident." *Id.* at ¶ 136 (quoting Lockton Consent Order, at ¶¶ 42-43).

"Under New York law, to state a claim for tortious interference with prospective economic advantage, the plaintiff must allege that '(1) it had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair, or improper means; and (4) the defendant's interference caused injury to the relationship.'" *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 400 (2d Cir.

2006) (quoting *Carvel Corp. v. Noonan*, 350 F.3d 6, 17 (2d Cir. 2003), *certified question answered*, 3 N.Y.3d 182, 785 N.Y.S.2d 359, 818 N.E.2d 1100 (N.Y. 2004)); *see Posner v. Lewis*, 18 N.Y.3d 566, 570, n. 2 (N.Y. 2012) (In New York, "[t]o state a cause of action for tortious interference with prospective contractual relations, a plaintiff must plead that the defendant directly interfered with a third party and that the defendant either employed wrongful means or acted 'for the sole purpose of inflicting intentional harm on plaintiff[.]") (quoting *Carvel Corp.*, 3 N.Y.3d at 190)). Defendants challenge the claims on the third element.

The third element requires proof that Defendants interfered with the NRA's prospective business relationship with Stockton solely out of malice or a desire to inflict harm upon the Plaintiff, or used improper or illegal means to interfere with this prospective business relationship. *See Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 547 F.3d 115, 132 (2d Cir. 2008) (stating the third element requires that "the defendant acted for a wrongful purpose or used dishonest, unfair, or improper means");[28] *Gym Door Repairs, Inc. v. Young*

[28] Although *Catskill Dev.* states that the third element is satisfied where the defendant acted for a wrongful purpose, the case discusses the element as requiring that the defendant employed wrongful means to disrupt the subject business relationship. *See Catskill Dev.*, 547 F.3d at 132 (citing *Guard–Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 191 (N.Y. 1980) (describing the interference with business relations tort as "interference with prospective contractual relations," and describing element three as "wrongful means")). Plaintiff cites cases addressing the "wrongful means" requirement. *See* Pl. Mem. L., at 37, fn. 184.

Equip. Sales, Inc., No. 15-CV-4244 (JGK), 2018 WL 4489278, at *11 (S.D.N.Y. Sept. 19, 2018) ("To establish the third element of tortious interference, the plaintiffs must demonstrate that the defendants acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort."); *see also Rockland Exposition, Inc. v. Alliance of Automotive Serv. Providers of N.J.*, 894 F. Supp. 2d 288, 333 (S.D.N.Y. 2012) (plaintiff must demonstrate that the defendant committed a 'crime or an independent tort' or applied economic pressure 'for the sole purpose of inflicting intentional harm on the plaintiff) (citation omitted). The allegations in the Amended Complaint fail to plausibly support either of these requirements.

Here, even accepting Plaintiff's allegations as true, Plaintiff fails to assert facts plausibly indicating that Defendants entered the Lockton Consent Order solely out of malice or for the sole purpose of inflicting harm on Plaintiff. *See R.M. Bacon, LLC v. Saint-Gobain Performance Plastics Corp.*, No. 1:17-CV-0441 (LEK/DJS), 2018 WL 1010210, at *6 (N.D.N.Y. Feb. 20, 2018) ("[I]t is not enough simply to allege intentional interference. Interference must be the defendant's sole objective.") (citations omitted). The Stockton Consent Order, voluntarily entered by DFS and Lockton after a DFS investigation, provides details of the numerous New York Insurance Law violations that Stockton admitted. The face of the Lockton Consent Order plainly indicates that it was entered, at least in part, for the purpose of remedying Lockton's New York Insurance Law violations discovered during the DFS

investigation. While the Amended Complaint asserts that Gov. Cuomo and Supt. Vullo's "sole purpose for requiring Lockton to no longer participate in lawful insurance programs with the NRA was to harm the NRA and drive it . . . out of New York state," Am. Compl., ¶ 137, it is implausible to conclude that simply because Lockton could no longer offer NRA affinity-type insurance programs that the NRA would be put out of business in New York.[29] Indeed, the Lockton Consent Order specifically allows Lockton to offer the NRA corporate insurance thereby signifying that the NRA could go about its other legitimate business activities, and nothing in the Lockton Consent Order prohibits or prevents other insurance companies from offering lawful affinity-type insurance programs to the NRA.

The Amended Complaint also fails to allege facts plausibly indicating that Defendants employed wrongful means in arriving at the Lockton Consent Order. To satisfy the wrongful means requirement, Plaintiff must demonstrate that Defendants interfered with the NRA's prospective business relations with Stockton by conduct amounting to a crime or an independent tort.

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[29] Further, the Lockton Consent Order plainly indicates a legitimate basis for including provisions prohibiting Lockton from engaging with the NRA to offer affinity-type insurance programs in New York. Many of Lockton's admitted violations arose from its interactions with the NRA, and no inference of improper motivation arises from provisions that guard against similar future violations.

See Carvel Corp., 3 N.Y.3d at 190.[30] The wrongful means requirement "makes alleging and proving a tortious interference claim with business relations more demanding than proving a tortious interference with contract claim." *Catskill Dev.*, 547 F.3d at 132 (interior quotation marks and citation omitted).

Although the Amended Complaint alleges that Defendants "used dishonest, wrongful, and improper means when intentionally interfering with the NRA's business relationship with Lockton," and "took intentional steps to violate the NRA's rights afforded by the United States and New York Constitutions and committed independent tortious conduct," Am. Compl. ¶ 37, these conclusory allegations are insufficient. The Lockton Consent Order was entered following a DFS investigation, and is based upon Lockton's admission of numerous insurance law violations. *See generally*, Dkt. No. 37-4. Plaintiff fails to identify how it was that Defendants engaged in dishonest, wrongful, and improper means to get Lockton to enter its Consent Order.

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[30] As the New York Court of Appeals explained:

> [W]here a suit is based on interference with a nonbinding relationship, the plaintiff must show that defendant's conduct was not "lawful" but "more culpable." The implication is that, as a general rule, the defendant's conduct must amount to a crime or an independent tort. Conduct that is not criminal or tortious will generally be "lawful" and thus insufficiently "culpable" to create liability for interference with prospective contracts or other nonbinding economic relations.

Carvel Corp., 3 N.Y.3d at 190.

Further, Plaintiff fails to allege facts plausibly indicating that Defendants engaged in tortious conduct to convince or induce Lockton to enter this Consent Order. As indicated, the Lockton Consent Order was arrived at following a DFS investigation. There are no allegations that Defendants engaged in threats, fraud, or misrepresentations during the investigation, or to support the conclusion that the DFS investigation amounted to meritless litigation intended to harass Lockton. *See Carvel Corp.*, 3 N.Y.3d at 192 ("Carvel did not drive the franchisees' customers away by physical violence, or lure them by fraud or misrepresentation, or harass them with meritless litigation.") (citation omitted). As stated, Lockton admitted numerous violations of New York Insurance Law and agreed to pay a hefty penalty. Whether the entry of the Lockton Consent Order amount to, or was a part of, a constitutional tort against the NRA is of no moment. The pertinent inquiry is whether Defendants employed wrongful means to disrupt Plaintiff's potential business with Lockton, *see R.M. Bacon*, 2018 WL 1010210, at *5 ("To state a claim for interference with prospective relations, a plaintiff must also allege that the defendant employed 'wrongful means' to disrupt the plaintiff's potential business.") (quoting *Ullmannglass v. Oneida, Ltd.*, 927 N.Y.S.2d 702, 705–06 (3d Dept. 2011)), which Plaintiff asserts was accomplished by the Lockton Consent Order. There are insufficient allegations that Defendants engaged in tortious conduct as a means to compel Lockton to enter its Consent Order.

In the end, Plaintiff's tortious interference with prospective economic advantage claims must be dismissed because the NRA fails to allege facts plausibly demonstrating that Defendants acted solely out of malice, or used improper means to harm the NRA by the entry of the Lockton Consent Order. *See*, *e.g.*, *Silver v. Kuehbeck*, 217 F. App'x 18, 21 (2d Cir. 2007) (affirming dismissal where the complaint "failed to allege that defendants interfered with plaintiff's business relationship *solely* to harm him or that he used wrongful means in doing so") (citation omitted) (emphasis in original); *R.M. Bacon*, 2018 WL 1010210, at *6 (concluding that plaintiff's tortious interference claims failed because the amended complaint did not allege that defendants "acted with the sole purpose of harming" the plaintiff) (citations omitted); *MVB Collision, Inc. v. Progressive Ins. Co.*, 13 N.Y.S.3d 139, 140 (2nd Dept. 2015) (affirming dismissal of a tortious interference claim where the defendant's "conduct was, at least in part, to advance its own interests, not solely for the purpose of harming the plaintiff"); *Besicorp Ltd. v. Kahn*, 736 N.Y.S.2d 708, 711–12 (3rd Dept. 2002) (affirming dismissal of a prospective business claim because "[r]ather than alleging that defendants' conduct was motivated solely by malice or a desire to inflict injury by unlawful or wrongful means as required, plaintiff alleges that defendants were motivated by their desire to maximize their financial gain") (emphasis omitted). Because the deficiency in Plaintiff's tortious interference with prospective economic advantage claims cannot be cured by better pleading, leave to amend these claims is denied.

V. CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss the Amended Complaint [Dkt. No. 40] is **GRANTED in part and DENIED in part**. In this regard,

-Defendants' motion to dismiss Counts One and Two is denied;

-Defendants' motion to dismiss Count Three is granted, and the freedom-of-association claims asserted in Count Three are dismissed without prejudice;

-Defendants' motion to dismiss Count Four is granted in part and denied in part. The motion is granted to the extent Plaintiff seeks an order enjoining Gov. Cuomo, Supt. Vullo, and DFS from requiring Lockton and Chubb to abide by their respective Consent Orders, and that much of Count Four seeking the injunctive relief requested in paragraph 113 is dismissed with prejudice. The motion is also granted to the extent that Plaintiff seeks an order enjoining Defendants from selectively enforcing the New York insurance laws against the NRA, and that much of Count Four seeking the injunctive relief requested in the Amended Complaint, "Request for Relief," ¶ a(3), is dismissed without prejudice. The motion is denied to the extent Plaintiff seeks monetary damages for Defendants' past acts of selective enforcement;

-Defendants' motion to dismiss Count Five is granted, and the conspiracy claims against Gov. Cuomo and Supt. Vullo are dismissed without prejudice;

-Defendants' motion to dismiss Count Six is granted, and the stigma-plus due process claims are dismissed without prejudice, and the property deprivation due process claims are dismissed with prejudice; and

-Defendants' motion to dismiss Count Seven is granted, and the tortious interference with prospective economic advantage claims against Gov. Cuomo and Supt. Vullo are dismissed with prejudice.

IT IS SO ORDERED.

Dated: November 6, 2018

/s/ Thomas J. McAvoy
Thomas J. McAvoy
Senior, U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of November, two thousand twenty-two.

National Rifle Association of America,

Plaintiff - Appellee

v.

Maria T. Vullo, both individually and in her former official capacity,

Defendant - Appellant.

ORDER

Docket No: 21-636

(Filed Nov. 9, 2022)

Appellee, National Rifle Association of America, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

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

NATIONAL RIFLE ASSOCIATION OF AMERICA,	§	
Plaintiff,	§	
v.	§	**CIVIL CASE NO. 18-CV-00566-TJM-CFH**
ANDREW CUOMO, both individually and in his official capacity; MARIA T. VULLO, both individually and in her official capacity; and THE NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES,	§	
Defendants.	§	

NATIONAL RIFLE ASSOCIATION OF AMERICA'S SECOND AMENDED COMPLAINT AND JURY DEMAND

(Filed Jun. 2, 2020)

Plaintiff the National Rifle Association of America (the "NRA") files this Second Amended Complaint and Jury Demand ("Complaint") against defendants New York Governor Andrew Cuomo ("Cuomo"), both individually and in his official capacity; Maria T. Vullo ("Vullo"), both individually and in her former official capacity; and the New York State Department of Financial Services ("DFS") (collectively, "Defendants"), upon personal knowledge of its own actions, and upon

information and belief as to all others matters, as follows:

I.

PRELIMINARY STATEMENT

This case is necessitated by an overt viewpoint-based discrimination campaign against the NRA and the millions of law-abiding gun owners that it represents. Directed by Governor Andrew Cuomo and former DFS Superintendent Maria Vullo, this campaign involves selective prosecution, backroom exhortations, and public threats with a singular goal—to deprive the NRA and its constituents of their First Amendment rights to speak freely about gun-related issues and defend their Second Amendment freedoms against encroachment.

Defendants' retaliation and selective-enforcement campaign surfaced with a series of threats to financial institutions that DFS, an agency created to ensure the integrity of financial markets after the 2008 credit crisis, will exercise its extensive regulatory power against those entities that have ties with the NRA. To commence their sweeping agenda, Defendants issued public demands that put DFS-regulated institutions on notice that they should avoid "arrangements with the NRA" and other "gun promotion organizations" if they planned to do business in New York.

At the same time, Defendants engaged in back-channel communications to reinforce their threats.

Thus, in a stunning display of unconstitutional overreach, Defendants made it clear to banks and insurers that it is bad business in New York to do business with the NRA. Moreover, Defendants knowingly targeted NRA-related insurance programs for violations not regularly enforced and not enforced against other similarly situated insurance programs.

As a direct result of this coercion, multiple financial institutions have succumbed to Defendants' threats and determined not to do business with the NRA. Others, who were already doing business with the NRA yielded to Defendants' demands and agreed to terminate longstanding, beneficial business relationships with the NRA, in New York and elsewhere. Of course, Defendants' abuses were intended to deprive the NRA of basic bank-depository services, corporate insurance coverage, and other financial services essential to the NRA's corporate existence and its advocacy mission.

Absent relief, Defendants' blacklisting campaign will continue to damage the NRA and its members, as well as endanger the free speech and association rights guaranteed by the constitutions of the United States and the State of New York. It is well-settled that viewpoint discrimination applied through "threat[s] of invoking legal sanctions and other means of coercion, persuasion, and intimidation" violates the United States Constitution where, as here, such measures

chill protected First Amendment activities.[1] Defendants' *de facto* censorship scheme cannot survive judicial scrutiny. Nor should it.

II.

PARTIES

1. Plaintiff the National Rifle Association of America is a nonprofit corporation organized under the laws of the State of New York with its principal place of business in Fairfax, Virginia. The NRA is America's leading provider of gun-safety and marksmanship education for civilians and law enforcement. It is also the foremost defender of the Second Amendment to the United States Constitution. The NRA has over five million members, and its programs reach millions more.

2. Defendant New York State Department of Financial Services is an agency of the State of New York that regulates financial services firms operating in New York in order to guard against financial crises and to protect New York consumers and markets from fraud. DFS has a regional office at One Commerce Plaza, Albany, New York 12257. Its main office is located at One State Street, New York, New York 10004-1511. It regulates more than 1,400 insurance companies with assets in excess of $4.3 trillion, including 200 life insurers, 1,100 property casualty insurers, and 100 health insurance companies. DFS also regulates over

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[1] *See*, *e.g.*, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 72 (1963).

1,900 banking and other financial institutions with assets over $2.9 trillion.

3. Defendant Maria T. Vullo is the former Superintendent of the New York State Department of Financial Services and, at all times relevant to the Complaint, was acting under color of state law. Her principal place of business is [redacted]. Vullo is sued in her individual and official capacities.

4. Defendant Andrew Cuomo is the Governor of the State of New York and, at all times relevant to the Complaint, was acting under color of state law. His principal place of business is The State Capitol Building, Albany, New York 12224. Cuomo is sued in his individual and official capacities.

III.

JURISDICTION AND VENUE

5. Pursuant to 28 U.S.C. § 1331, the Court has subject matter jurisdiction over the claims asserted in this action because this action involves claims based on the First and Fourteenth Amendments to the United States Constitution (U.S. Const. amend. I, XIV), and because the action seeks to prevent state officials from interfering with federal rights. Further, subject matter jurisdiction is conferred on this Court by 28 U.S.C. § 1343(a)(3) because this action is brought to redress deprivations under color of state law of rights, privileges, and immunities secured by

the United States Constitution. This Court has supplemental jurisdiction over all state-law claims asserted in this action under 28 U.S.C. § 1367.

6. Pursuant to 28 U.S.C. § 1391(b), venue is properly vested in this Court because defendant Cuomo resides in this judicial district.

7. There is a present and actual controversy between the parties.

8. The relief requested is authorized pursuant to 28 U.S.C. § 1343(a)(4) (recovery of damages or equitable relief or any other such relief for the protection of civil rights), 28 U.S.C. § 1651(a) (injunctive relief), 28 U.S.C. §§ 2201 and 2202 (declaratory and other appropriate relief), 42 U.S.C. § 1983 (deprivation of rights, privileges, and immunities secured by the Constitution), and 42 U.S.C. § 1988 (awards of attorneys' fees and costs).

IV.

STATEMENT OF RELEVANT FACTS

A. The NRA: History Of Dedicated Support For Gun Safety And A Commitment To Core Political Speech.

9. After the Civil War, two Union Army officers created a private association to promote marksmanship among the citizenry. Many officers believed that the war would have ended significantly sooner if the Union troops had been able to shoot as well as the Confederate soldiers. Therefore, a group of them obtained

a charter from the State of New York in November of 1871; thereafter, the National Rifle Association built a proud legacy in the State of New York.

10. From the NRA's inception, it received praise from the State of New York for its many public contributions. In 1872, the New York State legislature and the NRA jointly dedicated funds for the creation of a rifle range on Creed Farm, in what is now Queens Village, Queens, New York. For many decades, the NRA partnered with the State to advance firearms safety, education, conservation, and other laudable public policy goals. For example, when New York City public schools sought to educate boys in marksmanship and gun safety, NRA co-founder Gen. George Wingate designed and headed the resulting Public Schools Athletic League (PSAL) marksmanship program.[2] Likewise, in 1949, the NRA worked with the State of New York to create the nation's first hunter education program. Similar courses were subsequently adopted by state fish and game departments across the country and in Canada and help make hunting among the safest sports in existence.

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[2] *See*, *e.g.*, STEVEN A. RIESS, SPORTS IN AMERICA FROM COLONIAL TIMES TO THE TWENTY-FIRST CENTURY: AN ENCYCLOPEDIA 736 (Steven A. Riess ed., 2015); ROBERT PRUTER, THE RISE OF AMERICAN HIGH SCHOOL SPORTS AND THE SEARCH FOR CONTROL, 1880-1930 122 (1st ed. 2013); Robert Pruter, *Boys Rifle Marksmanship*, ILLINOIS HIGH SCHOOL ASSOCIATION, http://www.ihsa.org/archive/hstoric/marksmanship_boys.htm?NOCACHE=5:53:58%20PM (last visited May 11, 2018).

11. First among the "Purposes and Objectives" contained in the NRA's bylaws is "[t]o protect and defend the Constitution of the United States." That is not surprising, because political speech is a major purpose of the NRA, as it engages in extensive advocacy at all levels of government to promote the rights of its members and all Americans.

12. The NRA spends tens of millions of dollars annually distributing pamphlets, fact sheets, articles, electronic materials, and other literature to advocate for its views on the Second Amendment and to assist NRA members engaging in national, state, and local firearm dialogue. The NRA's direct mail, television, radio, and digital communications seek to educate the public about issues bearing on the Second Amendment, defend the NRA and its members against political and media attacks, and galvanize participation in the political process by NRA members and supporters.

13. To its critics, the NRA is best known as a "superlobby – one of the largest and most truly effective lobbying organizations in the country," able to mobilize its millions of members in concerted efforts to protect the Second Amendment rights of all Americans.[3] Of

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[3] CHRISTINA ROBB, *HANDGUNS AND THE AMERICAN PSYCHE THE ATTEMPTED ASSASSINATION OF A PRESIDENT BRINGS THE ISSUE INTO SHARP FOCUS ONCE AGAIN. HANDGUNS – WHAT DO THEY MEANS TO AMERICANS? TO THE NRA, THEY ARE A SYMBOL OF FREEDOM; TO THOSE FRIGHTENED OF CRIME, THEY REPRESENT SAFETY – EVEN IF THE OWNER DOESN'T KNOW HOW TO USE THEM; TO GUN CONTROL ADVOCATES, THEY ARE*

course, the NRA's letter-writing campaigns, peaceable public gatherings, and other grassroots "lobbying" activities constitute precisely the type of political speech which rests "[a]t the core of the First Amendment."[4]

B. Cuomo's Political Vendetta Against The NRA.

14. Andrew Cuomo has criticized the political speech and influence of "Second Amendment types"[5] generally, and the NRA specifically, for decades. In fact, Cuomo has a history of abusing his regulatory power to retaliate against his political opponents on gun control issues.

15. The son of former Governor Mario Cuomo, Cuomo is a political opportunist who consistently seeks to gain political capital by attacking the NRA. During his tenure as Housing and Urban Development ("HUD") Secretary in the 1990s, Cuomo famously coordinated a campaign of lawsuits (nearly all dismissed) against gunmakers that purported to hold them liable

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SYMBOLS OF ULTIMATE EVIL., BOSTON GLOBE, 1981 WLNR 68847 (June 7, 1981).

[4] *See Brown v. Hartlage*, 456 U.S. 45, 52 (1982).

[5] On February 15, 2018, Cuomo appeared on the MSNBC program "The Beat," where he discussed championing legislation that some believed "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 thereafter dropped due to "backlash from conservatives and Second Amendment types." *Id.*

for crimes committed in public housing projects by criminals using illegally obtained firearms. Later, Cuomo admitted that his real aim was to coerce, via settlement, the "voluntary" industrywide adoption of certain equipment and sale restrictions, and warned that any manufacturer who refused to settle would suffer "death by a thousand cuts."[6] Decried by even gun-control supporters as "wrong" and an abuse of agency authority,[7] the HUD effort failed after the NRA and other pro-gun groups organized legislative and grass-roots opposition.[8]

16. Cuomo blamed "gun lobby extremists" for the collapse of his efforts at HUD.[9] At a press conference

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[6] Bill McAllister, *Gun Industry Rejects Settlement Effort*, THE DENVER POST (Feb. 1, 2000), http://www.wagc.com/gun-industry-rejects-settlement-effort/.

[7] In an editorial dated December 17, 1999, the Washington Post described the Cuomo campaign as "disquieting even for those who, like us, strongly support rigorous controls on handguns." *The HUD Gun Suit*, THE WASHINGTON POST (Dec. 17, 1999), https://www.washingtonpost.com/archive/opinions/1999/12/17/the-hud-gun-suit/48ee0a45-18da4e8d-9b86-b9512172ae09/?utm_term=.9a74ce83f538. Anticipating themes that would continue to characterize Cuomo's gun-control efforts over the next nineteen years, the editorial board stated that "it . . . seems wrong for an agency of the federal government" to put "pressure on an industry . . . to achieve policy results the administration has not been able to achieve through normal legislation or regulation." *Id.*

[8] *See*, *e.g.*, *House Blocks Money For Gun Pact*, CBS NEWS (June 21, 2000, 11:58 PM), https://www.cbsnews.com/news/house-blocks-money-for-gun-pact/.

[9] *HUD Archives: News Releases, HUD No. 00-150, COMMUNITIES FOR SAFER GUNS COALITION JOINS CUOMO IN CRITICIZING EFFORT IN CONGRESS TO KILL THE*

on June 20, 2000, he referred to gun-rights supporters as "the enemy," and announced a blueprint for defeating the NRA and its allies that would emphasize the use of state and municipal retaliatory authority: "If we engage the enemy in Washington we will lose. They will beat us in this town. They are too strong in this town. Their fortress is within the Beltway. We're going to beat them state by state, community by community."[10]

17. As governor of New York, Cuomo has loudly supported the enactment of some of the nation's harshest gun-control laws.[11] But rather than debate opponents of his anti-gun initiatives, he declared that conservative firearms advocates "have no place in the state of New York."[12] Accordingly, Cuomo has sought to banish "the enemy" from public discourse altogether, and remains dissatisfied with what he perceives to be

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COALITION, U.S. DEP'T OF HOUS. AND URBAN DEV. (June 27, 2000, archived Dec. 13, 2009).

[10] *Remarks by Secretary Andrew Cuomo Handgun Control, Inc, Washington, D.C. Tuesday, June 20, 2000*, U.S. DEP'T OF HOUS. AND URBAN DEV. (Jan. 20, 2009), https://archives.hud.gov/remarks/cuomo/speeches/handguncontrl.cfm.

[11] *See*, *e.g.*, Teri Weaver, *Judge: NY must release Safe Act stats from assault weapons registry*, SYRACUSE (May 7, 2015, 9:09 PM), http://www.syracuse.com/news/index.ssf/2015/05/judge_ny_must_release_safe_act_data_on_assault_weapons_registry.html.

[12] Heather Long, *Conservatives aren't welcome in New York, according to Governor Cuomo*, THE GUARDIAN (Jan. 14, 2014, 8:49 AM), https://www.theguardian.com/commentisfree/2014/jan/24/governor-cuomo-conservatives-not-welcome-new-york.

the excessive political influence of "conservatives and the Second Amendment types."[13]

18. In truth, Cuomo bears distinct animus toward the NRA, which he accuses of exerting a "stifl[ing] . . . stranglehold" over national gun policy.[14] For Cuomo, weakening the political advocacy of the NRA is a career strategy.

C. Defendants Attempt To Chill The NRA's Political Speech In Support Of Americans' Second Amendment Rights.

19. Against the backdrop of recent tragedies and a polarized public gun-control debate, Cuomo and the other Defendants have abused their authority in an overt effort to stifle the NRA's political advocacy and to retaliate against the NRA for the effectiveness of that advocacy.

20. Together with former DFS Superintendent Vullo, his longtime lieutenant,[15] Cuomo embarked on a

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[13] 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 December 9, 2019).

[14] Kenneth Lovett, *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/cuomoblasts-jeb-stupid-insensitive-gun-tweet-article-1.2534528.

[15] Cuomo and Vullo have worked together since at least 2006 when Vullo served as a "top aide" to Cuomo in his role as attorney general. Cuomo nominated Vullo to be DFS Superintendent approximately ten years later. Jimmy Vielkind, *Cuomo nominates ex-aide to head Department of Financial Services*, Politico (Jan.

campaign to chill the political speech of the NRA and other so-called "gun promotion" organizations by leveraging state power to punishing financial institutions which maintain "business arrangements with the NRA." To achieve this, Defendants draw upon the formidable regulatory powers of DFS—an agency charged with ensuring the stability and integrity of New York's financial markets.

21. At Cuomo's behest, Vullo and DFS have threatened regulated institutions with costly investigations, increased regulatory scrutiny and penalties should they fail to "discontinue[] . . . their arrangements with the NRA."[16] Many of the most pernicious of these threats occurred privately. For example, beginning in February 2018, Vullo met personally with executives of regulated institutions, including Lloyd's.[17] During the meetings she discussed an array of technical regulatory infractions plaguing the affinity-insurance marketplace. Vullo made it clear, however, that DFS was less interested in pursuing the

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21, 2016, 5:14 AM), https://www.politico.com/states/newyork/albany/story/2016/01/cuomo-nominates-ex-aide-to-head-department-of-financial-services-030286.

[16] *GOVERNOR CUOMO DIRECTS DEPARTMENT OF FINANCIAL SERVICES TO URGE COMPANIES TO WEIGH REPUTATIONAL RISK OF BUSINESS TIES TO THE NRA AND SIMILAR ORGANIZATIONS*, N.Y. STATE GOVERNOR ANDREW M. CUOMO (Apr. 19, 2018), https://www.governor.ny.gov/news/governor-cuomo-directs-department-financial-services-urge-companies-weigh-reputational-risk.

[17] Vullo met with, and threatened, executives of Lloyd's of London ("Lloyd's") and its United States affiliate, Lloyd's America, Inc, ("LAI").

infractions of which she spoke, so long as Lloyd's ceased providing insurance to gun groups, especially the NRA. The threat was clear and unambiguous. Shortly thereafter, Defendants began to deliver on it. Within a single week, DFS levied multi-million dollar fines against two insurance-industry firms that dared to do business with the NRA. Under intense scrutiny, both firms, and later a third (together comprising all the issuers of NRA-related policies for the NRA and its members), were coerced to terminate their business arrangements with the NRA and its members—including arrangements having nothing to do with the allegedly unlawful conduct cited by DFS.

22. Importantly, Defendants were fully aware by at least March 2018 (and likely earlier) that non-NRA insurance policies exhibiting the same features were being marketed on behalf of other affinity organizations. Defendants intentionally ignored such knowledge and did not undertake enforcement actions relating to these other similarly constructed programs because enforcing the Insurance Law was never their goal. Instead, as DFS explained to Lloyd's in closed-door meetings, the Cuomo administration sought to focus on "gun programmes" and gun advocacy groups generally.

23. A DFS press release publicizing one enforcement action makes clear the gravamen of Defendants' campaign: financial institutions regulated by DFS must refrain from "[e]ntering into any . . . agreement or

arrangement," which "involv[es] the NRA, directly or indirectly"[18]—or face the consequences.

1. DFS And Its Regulatory Mission.

24. In 2011, as part of his state budget, Cuomo announced the merger of the New York State Insurance Department and the Banking Department to create DFS. The mandate of the new agency, which consolidated supervisory and enforcement powers previously vested in separate departments, is to "reform the regulation of financial services in New York to keep pace with the rapid and dynamic evolution of these industries, to guard against financial crises and to protect consumers and markets from fraud."[19]

25. The Superintendent of DFS has broad regulatory and enforcement powers, which encompass the ability to initiate civil and criminal investigations and enforcement actions. In addition, pursuant to Financial Services Law, Article 3, § 301, the DFS superintendent has the power to refer matters to the attorney

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[18] *DFS FINES LOCKTON COMPANIES $7 MILLION FOR UNDERWRITING NRA-BRANDED "CARRY GUARD" INSURANCE PROGRAM IN VIOLATION OF NEW YORK INSURANCE LAW*, N.Y. STATE DEP'T OF FIN. SERVS. (May 2, 2018), https://www.dfs.ny.gov/about/press/pr1805021.htm; *see also* DFS FINES CHUBB SUBSIDIARY ILLINOIS UNION INSURANCE COMPANY $1.3 MILION FOR UNDERWRITING NRA-BRANDED "CARRY GUARD" INSURANCE PROGRAM IN VIOLATION OF NEW YORK INSURANCE LAW, N.Y. STATE DEP'T OF FIN. SERVS. (May 7, 2018), https://www.dfs.ny.gov/about/press/pr1805071.htm.

[19] N.Y. STATE DEP'T OF FIN. SERVS. (Dec. 12, 2017), https://www.dfs.ny.gov/about/mission.htm.

general for criminal enforcement. The creation of an agency with such expansive prerogatives and capabilities "grab[bed] power and headlines," and the New York Times reported in 2015 that the first DFS superintendent, Benjamin Lawsky, was popularly caricatured as "the new sheriff of Wall Street" and an all-powerful monarch ("King Lawsky").[20]

26. New York Financial Services Law, Article 2, § 201, provides the superintendent of DFS with formidable authority to, among other things, "ensure the continued solvency, safety, [and] soundness" of banks and insurance companies.[21] Accordingly, DFS directives regarding "risk management" must be taken seriously by financial institutions—as risk-management deficiencies can result in fines of hundreds of millions of dollars.

27. DFS's regulatory mandate does not include setting gun-control policy. Nor does any statute or other authority empower DFS to blacklist, from receipt of insurance or banking services, speakers with political viewpoints objectionable to the governor or DFS superintendent. In addition, DFS has no authority to engage in unlawful viewpoint discrimination.

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[20] Jessica Silver-Greenberg and Ben Protess, *Benjamin Lawsky, Sheriff of Wall Street, Is Taking Off His Badge*, THE NEW YORK TIMES (May 20, 2015), https://www.nytimes.com/2015/05/21/business/dealbook/benjamin-lawsky-to-step-down-as new-yorks-top-financial-regulator.html.

[21] New York Financial Services Law Article 2, § 201 ("Declaration of Policy").

2. <u>The NRA Depends Upon Essential Financial Services to Fulfill Its Advocacy Mission</u>

28. The NRA's direct-mail campaigns, digital media broadcasts, television and radio communications, grassroots organizing, membership recruitment, and other core political speech and associational activities are carried out by a combination of volunteers, employees, and independent contractors engaged by the NRA and its affiliates. To meet payroll obligations, purchase mailing materials and media airtime, maintain its Internet presence, and otherwise continue to advocate for the Second Amendment of the United States Constitution, the NRA must have the ability to process and retain cash, check, wire-transfer, and other donations from members and events throughout the country, as well as transmit and apply these funds to meet operational needs. Accordingly, the NRA relies upon depository services, cash management services, lockbox services, disbursement services, wire-transfer services, and remote banking services of the type generally offered by major wholesale banking institutions.

29. To continue its existence as a not-for-profit organization and fulfill its advocacy objectives, the NRA also must maintain various corporate insurance coverage. General liability and related "umbrella" coverage allow the NRA to maintain physical premises, convene off-site meetings and events, and operate educational programs promoting the safe use of firearms which are vital to the NRA's mission. For its Annual Meeting, Great American Outdoor Show, and other

major rallies, conventions and assemblies with explicitly expressive purposes, the NRA generally must also purchase event-specific coverage. Absent such coverage, the NRA could be forced to cease circulation of various print publications and magazines.

30. In addition, like many affinity groups and organizations nationwide, the NRA seeks to make life, health, and other insurance coverage available to its members on affordable, tailored terms. To this end, the NRA contracted with multiple insurance-industry firms to develop, market, and underwrite insurance programs endorsed by the NRA. Pursuant to these arrangements, the NRA performs none of the functions of an insurer. It does lend its valuable logos, marks, and endorsements to insurance programs brokered and serviced by others. Such "affinity" insurance plans are common and believed by many to be a suitable substitute for employer-based coverage.[22]

31. From 2000 onward, the NRA contracted with affiliates of the world's largest privately held insurance broker, Lockton Companies, LLC (collectively with pertinent affiliates, "Lockton"),[23] for affinity-program brokerage and administration services. Lockton has provided services in the affinity-insurance

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[22] *See*, *e.g.*, Rachel Louise Ensign, *Affinity-Group Plans*, THE WALL STREET JOURNAL (Sept. 11, 2011), http://online.wsj.com/article/SB10001424053111904836104576563341 686006336.html.

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

market for decades and caters to a wide array of industries and clients including franchises, professional and trade organizations, fraternal organizations, and common-cause groups such as the NRA. For roughly seventeen years, Lockton entities administered and marketed NRA-endorsed insurance in New York State and across the nation without incident. In addition to its affinity-insurance transactions with the NRA, Lockton has also served for decades as the NRA's trusted insurance broker for various corporate coverage—such as general liability, umbrella and director and officer insurance.

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

33. The NRA has been the target of activist boycott efforts in the past, including campaigns that urged insurance companies and other private actors to cease doing business with the NRA. However, because these campaigns were carried out by non-governmental activist groups who lack the government's power to punish those who refused to join the boycott, their methods have centered on persuasion—not coercion. Unaided

by the brute force of state power, activists never successfully persuaded the NRA's banking or insurance partners to sever ties with the NRA. This changed in 2017, when one activist organization successfully enlisted Defendants in a joint effort to silence the NRA.

3. DFS Commences A Politically Motivated Investigation Focused Ostensibly on NRA-Endorsed "Affinity" Insurance.

34. During or about September 2017, a non-governmental activist organization known as Everytown for Gun Safety ("Everytown") contacted the New York County District Attorney's Office (the "DA's Office"), as well as state and municipal authorities in other jurisdictions, in an effort to prompt a crackdown by sympathetic government officials that would target alleged compliance infirmities in Carry Guard. Notably, Everytown is not an organization dedicated to insurance compliance; instead, its explicit political mission is to oppose the NRA.[24] On September 13, 2017, representatives from the DA's Office met with DFS to effectuate Everytown's agenda.

35. As a result, in October 2017, DFS launched an investigation that focused ostensibly on Carry Guard and was directed in the first instance at Lockton. On

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

its website, Everytown took credit for instigating the inquiry[25]—but even if it had not, the political underpinnings and selective focus of the investigation were clear. The investigation was chronicled in the national media before the NRA received official notice of it, and it targeted none of the available self-defense insurance products except Carry Guard, which was endorsed by the NRA.

36. Of course, Carry Guard was not Defendants' true focus, and the scope of the DFS investigation rapidly expanded. At first, Defendants purported to target a discrete subset of so-called "excess line" property and casualty policies relating to firearms—a category that encompassed Carry Guard, but also included policies such as Gun Club Insurance and Hunt Club Insurance. However, Defendants' goal, from the outset, was to disrupt any and all business arrangements between the NRA and any insurance administrator, broker, or underwriter—indeed, any financial institution. Within weeks of commencing its investigation, DFS began to target insurance programs that had nothing to do with firearms, and instead provided coverage similar or identical to coverage endorsed by other New York affinity organizations such as the New York State Bar Association, the New York City Bar, the National

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

Association for the Self-Employed, the New York Association of Professional Land Surveyors, and the New York State Psychological Association.

37. DFS has not announced—even to this day—similar inquiries concerning any of these other membership organizations, although their affinity programs involve most, if not all, of the practices and features referenced by DFS in its investigation of the NRA's affinity programs. Instead, Defendants selectively targeted the NRA because of the NRA's constitutionally protected legislative and grassroots advocacy activities. Defendants specifically intend to undermine the NRA's ability to conduct its affairs in New York—and to advance Cuomo's anti-NRA political agenda.

4. Over The Course Of The Investigation, Cuomo And DFS Exhort Firms To Sever Ties With The NRA.

38. Throughout its purported investigation of Carry Guard in late 2017 and early 2018, DFS communicated to banks and insurers with known or suspected ties to the NRA that they would face regulatory action if they failed to terminate their relationships with the NRA. These exhortations extended far beyond Carry Guard (the policy purportedly raising regulatory concerns), indicating that any business relationship whatsoever with the NRA would invite adverse action.

39. The impact of Defendants' campaign on the NRA's ability to access essential financial services has been far greater than—and, clearly distinct from—the

impact of any public controversy relating to recent tragedies.

40. For example, during February 2018, the NRA issued a Request for Proposal ("RFP") to multiple banks, inviting them to submit bids to provide depository services, cash-management services, and other basic wholesale banking services necessary to the NRA's advocacy. The NRA received enthusiastic responses from several banks.

41. Likewise, in early January 2018, the NRA began negotiating with a major DFS-regulated insurance carrier (the "Corporate Carrier") to renew its General Liability, Umbrella, and Media Liability insurance coverage policies, which were set to expire during Spring 2018. Those negotiations remained on-course until the final days of February 2018, when Defendants sharply escalated their threats.

42. On or about February 25, 2018, the Chairman of Lockton Companies, placed a distraught telephone call to the NRA. Lockton had been a close business partner of the NRA for nearly twenty years; its commitment to the parties' business relationship had not wavered in connection with the Parkland tragedy, nor the prior Sandy Hook tragedy, nor any previous wave of public controversy relating to gun control. Nonetheless, although he expressed that Lockton privately wished to continue doing business with the NRA, the chairman confided that Lockton would need to "drop" the NRA—entirely—for fear of "losing [our] license" to do business in New York.

43. On February 26, 2018, Lockton publicly tweeted that it would discontinue providing brokerage services for ***all*** NRA-endorsed insurance programs.

44. Days later, the Corporate Carrier abruptly reversed its position in its corporate-insurance-renewal negotiations with the NRA. Although it had previously indicated it would be willing to extend the NRA's General Liability and Umbrella coverage on favorable terms consistent with the NRA's favorable claims history, the Corporate Carrier now stated that it was ***unwilling to renew coverage at any price***. The Corporate Carrier severed mutually beneficial business arrangements with the NRA because it learned of Defendants' threats directed at Lockton and feared it would be subject to similar reprisals.

45. Defendants soon supplemented their back-channel threats with official regulatory "guidance." In April 2018, Cuomo directed DFS to publicly "urge insurers and bankers statewide to determine whether any relationship they may have with the NRA or similar organizations sends the wrong message to their clients and their communities who often look to them for guidance and support."[26]

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[26] *GOVERNOR CUOMO DIRECTS DEPARTMENT OF FINANCIAL SERVICES TO URGE COMPANIES TO WEIGH REPUTATIONAL RISK OF BUSINESS TIES TO THE NRA AND SIMILAR ORGANIZATIONS*, N.Y. STATE GOVERNOR ANDREW M. CUOMO (Apr. 19, 2018), https://www.governor.ny.gov/news/governor-cuomo-directs-department-financial-services-urge-companies-weigh-reputational-risk, attached hereto as Exhibit A (the "Cuomo Press Release").

46. On April 19, 2018, Vullo, as Superintendent of DFS, issued a pair of ominous "guidance" letters (the "April 2018 Letters") directed at the chief executive officers, or equivalents, of all New York State chartered or licensed financial institutions and all insurers doing business in New York. The April 2018 Letters urged recipients to sever ties with the NRA and other "gun promotion organizations."[27] The directive was packaged in a sharply worded media advisory meant to generate headlines—and apply maximum public pressure to the NRA and those with whom it associates.

47. The April 2018 Letters are suffused with political concerns far afield from DFS's mandate to prevent financial crises and financial fraud. For example, they urge banks and insurers to heed "the voices of the passionate, courageous, and articulate young people" speaking out in favor of gun control, and to reconsider any business relationships with "the [NRA], and similar organizations that promote guns and lead to senseless violence." However, the April 2018 Letters do not

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[27] Maria T. Vullo, *Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations*, N.Y. STATE DEP'T OF FIN. SERVS. (Apr. 19, 2018), https://www.dfs.ny.gov/legal/dfs/DFS_Guidance_Risk_Management_NRA_Gun_Manufacturers-Insurance.pdf (addressed to the CEOs or equivalents of insurers doing business in the State of New York), attached hereto as Exhibit B; Maria T. Vullo, *Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations*, N.Y. STATE DEP'T OF FIN. SERVS. (Apr. 19, 2018), https://www.dfs.ny.gov/legal/dfs/DFS_Guidance_Risk_Management_NRA_Gun_Manufacturers-Banking.pdf (addressed to the CEOs or equivalents of New York State chartered or licensed financial institutions), attached hereto as Exhibit C.

merely express Defendants' own political opinions: they invoke the "risk management" obligations of recipients, and direct banks and insurers to "take prompt actions to manage" purported "reputational risks" arising from "dealings with the NRA or similar gun promotion organizations."

48. Read in the context of the preceding months' private communications—as well as disclosures that would soon follow concerning consequences imposed on firms doing business with the NRA—the April 2018 Letters were threats that deliberately invoked DFS's "risk management" authority to warn of adverse action if institutions failed to support Defendants' efforts to stifle the NRA's speech and to retaliate against the NRA based on its viewpoint.

49. Importantly, the April 2018 Letters contain no language clarifying that DFS would forebear from directly enforcing the letters' terms. Nor do the April 2018 Letters provide regulated institutions with any objective criteria for measuring the "reputational risks" imposed by dealings with entities that "promote guns that lead to senseless violence." This is because Defendants intended the April 2018 Letters to intimidate institutions into acceding to a political blacklisting campaign and have nothing to do with the types of market "risks" properly regulated by DFS.

50. To further dispel any ambiguity surrounding the April 2018 Letters, Cuomo and Vullo issued the contemporaneous Cuomo Press Release, containing and endorsing a statement by Vullo that directly "urge[s]

all insurance companies and banks doing business in New York to join the companies that have already discontinued their arrangements with the NRA."[28]

51. Likewise, on April 20, 2018, Cuomo publicly tweeted: "The NRA is an extremist organization. I urge companies in New York State to revisit any ties they have to the NRA and consider their reputations, and responsibility to the public."[29]

52. The intended and actual effect of the April 2018 Letters, and the actions by Cuomo and Vullo, is to coerce insurance agencies, insurers, and banks into terminating business relationships with the NRA that were necessary to the survival of the NRA as a charitable organization.

53. Third-party commentators immediately raised concerns about the First Amendment implications of DFS's actions. For example, on April 22, 2018, shortly after issuance of the April 2018 Letters, Brian Knight, a Senior Research Fellow and financial regulation expert at George Mason University, published an article expressing alarm that the April 2018 Letters "appear[ed] to be *inherently* about political speech," and should be immediately withdrawn.[30] In the face of such

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[28] Ex. A.

[29] Andrew Cuomo (@NYGovCuomo), TWITTER (Apr. 20, 2018, 8:58 AM), https://twitter.com/NYGovCuomo/status/987359763825614848.

[30] Brian Knight, *Is New York using bank regulation to suppress speech?*, FINREGRAG (Apr. 22, 2018), https://finregrag.com/is-new-york-using-bank-regulation-to-suppress-speech-ac61a7cb3bf.

criticism (and this litigation), Cuomo doubled down, declaring that a lawsuit which alleges unconstitutional censorship of the NRA's "dangerous agenda" means "you know you're doing something right."[31]

D. The Damage Done.

1. DFS Permanently Restricts Lockton From Doing Business With The NRA In New York.

54. On May 2, 2018, two weeks after Vullo issued the April 2018 Letters, Lockton entered into a consent order Under Articles 21, 23, and 34 of the Insurance Law (the "Lockton Consent Order") with DFS—signed by Vullo—which imposes a civil monetary penalty of $7 million.[32] Although the Lockton Consent Order ostensibly addresses discrete violations by specific Lockton entities of New York's Insurance Law, its provisions go much further. Most notably, the Lockton Consent Order purports to restrict Lockton's participation in ***any*** NRA-endorsed insurance programs in New York State, irrespective of whether such programs comply with the Insurance Law.

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[31] Kenneth Lovett, *NRA slapping Cuomo with lawsuit over blacklisting campaign, violating First Amendment rights*, NEW YORK DAILY NEWS (May 11, 2018), http://www.nydailynews.com/news/politics/nra-slapping-cuomo-lawsuit-blacklisting-campaign-article-1.3984861#; Andrew Cuomo (@NYGovCuomo), TWITTER (May 12, 2018, 8:50 AM), https://twitter.com/NYGovCuomo/status/995330370592632832.

[32] The Lockton Consent Order is attached hereto as Exhibit D.

55. Specifically, the Lockton Consent Order requires that Lockton agree "not to participate in . . . any other NRA-endorsed programs with regard to New York State." Nor may Lockton "enter into any agreement or program with the NRA to underwrite or participate in any affinity-type insurance program involving any line of insurance to be issued or delivered in New York State or to anyone known to Lockton to be a New York resident." As a result, Lockton is prohibited from selling NRA affinity-insurance outside New York to any individual who maintains a New York residence.

56. DFS and Vullo have no legal basis to restrict Lockton's involvement with insurance programs that do not violate New York's Insurance Law; nor do they have authority to regulate insurance transactions outside of New York. Nevertheless, DFS mandated that Lockton never enter into any future agreements with the NRA for legitimate and fully compliant insurance programs in New York.

57. Furthermore, Lockton would violate the Lockton Consent Order if it markets an ordinary property, casualty, or life insurance policy in the State of New York that was accompanied by an NRA logo or endorsement—notwithstanding that a comparable logo or endorsement referencing any other affinity or common-cause organization is permissible. This provision of the Lockton Consent Order is deliberate and intended to impair the NRA's ability to negotiate insurance benefits for its members, damage the NRA's goodwill among

its membership, and unconstitutionally restrict the NRA's speech on the basis of political animus.

58. Several of the purported "violations" assessed pursuant to the Lockton Consent Order concern programs commonly engaged in by numerous additional affinity associations that do not publicly advocate for Second Amendment rights and, therefore, are not targets of Defendants' unconstitutional conduct. Several such organizations are clients of Lockton—yet the Consent Order does not compel Lockton to discontinue its purportedly unlawful conduct with respect to these clients.

59. For example:

- DFS claims that Lockton Affinity violated Insurance Law § 2122(a)(1) by referring to the insurer's AM Best rating. Yet, at the time this lawsuit was filed, Lockton Affinity's affinity program for the American Optometric Association through AOAExcel ("AOAExcel") touted the "backing of a carrier that is rated A+ (Superior) by A.M. Best.[33] Similarly, Lockton Affinity currently advertises that coverage for the affinity programs designed for the Veterans of Foreign Wars ("VFW") and Moose International Inc. ("Moose") was through companies "rated 'Excellent' or higher by A.M. Best."[34]

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[33] *Questions? We have answers for you.*, AOAINSURANCEALLIANCE, http://aoainsurancealliance.com/faq/ (last visited May 7, 2018).

[34] *FVW Post Insurance Program, Program Information*, VFW INSURANCE, http://vfwinsurance.com/wp-content/uploads/sites/29/2017/12/VFW_Post_Insurance_Information_Packet.pdf (last visited

- DFS claims that Lockton Affinity violated Insurance Law § 2324(a) by giving or offering to give no cost insurance to NRA members in good standing. Yet, Lockton Affinity currently made that same offer to members of both the Professional Photographers of America ("PPA")[35] and the VFW.[36]

- DFS claims that Lockton Affinity violated Insurance Law § 2116 by compensating the NRA based on actual premiums collected. Yet, Lockton Affinity paid AOAExcel, Moose, the VFW, the PPA, and dozens of other clients in the same or similar manner.

60. Even if such conduct does violate insurance law, DFS's selective enforcement of such offenses as to NRA-endorsed policies—but not as to other policies marketed by Lockton in an identical fashion—constitutes impermissible viewpoint discrimination and a denial of equal protection under the law.

61. Despite the backlash concerning the expansive coercive scope and clear political agenda of the April 2018 Letters, Defendants remained undaunted in their effort to deprive the NRA of such services; as such, their overall messaging to financial institutions remained unaffected. Indeed, the DFS press release

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May 7, 2018); MOOSE INSURANCE PROGRAM, http://mooseinsuranceprogram.com/ (last visited May 7, 2018).

[35] INSURANCE FOR PPA, https://insuranceforppa.com/ (last visited May 7, 2018).

[36] VFW INSURANCE, http://vfwinsurance.com/life-insurance/#no-cost (last visited May 7, 2018).

publicizing the Lockton Consent Order trumpeted the same concession by Lockton that had inspired its chairman's furtive telephone call months before: Lockton must "refrain from [e]ntering into any other agreement or arrangement . . . involving the NRA, directly or indirectly"—including, but not limited to, affinity-insurance.[37]

2. DFS Purports To Prohibit Chubb From Doing Business With The NRA Anywhere.

62. On May 7, 2018, Chubb Group Holdings, Inc. and Illinois Union (together, "Chubb") entered into a Consent Order Under Sections 1101 and 3420 of the Insurance Law (the "Chubb Consent Order") with DFS—signed by Vullo—which imposes a civil monetary penalty of $1.3 million.[38] Similar to the Lockton Consent Order, in the Chubb Consent Order, DFS overextends its authority and purports to restrict Chubb's participation in *any* affinity-type insurance program with the NRA, irrespective of whether such programs comply with the Insurance Law.

63. Although DFS restricted Lockton from participating in any affinity-type insurance programs with the NRA in New York or with New York residents,

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[37] *DFS FINES LOCKTON COMPANIES $7 MILLION FOR UNDERWRITING NRA-BRANDED "CARRY GUARD" INSURANCE PROGRAM IN VIOLATION OF NEW YORK INSURANCE LAW*, N.Y. STATE DEP'T OF FIN. SERVS. (May 2, 2018), https://www.dfs.ny.gov/about/press/pr1805021.htm.

[38] The Chubb Consent Order is attached hereto as Exhibit E.

Defendants' restrictions in the Chubb Consent Order contain no geographic constraint whatsoever. Instead, the Chubb Consent Order purports to limit Chubb's involvement with the NRA anywhere, and everywhere, in the world.

64. Nevertheless, DFS allows Chubb to continue to underwrite affinity-type insurance programs with other affinity or common-cause organizations that do not publicly advocate for Americans' Second Amendment rights, so long as Chubb undertakes "reasonable due diligence to ensure that any entity involved . . . is acting in compliance with the Insurance Law. . . ."[39] The only plausible explanation for the DFS's complete exclusion of NRA-endorsed policies, even those "in compliance with the Insurance Law," is that Defendants seek to misuse DFS's power to deprive the NRA of insurance and financial services, on the sole ground that Defendants disapprove of the NRA's viewpoint regarding gun control.

3. Ignoring Identical Features of Comparable Affinity-Insurance Programs, Defendants Impermissibly Targeted the NRA.

65. Beginning during the Fall of 2017, including through a subpoena issued to Lockton and research supplied by Everytown, Defendants became aware of pervasive, colorable regulatory infirmities affecting numerous affinity-insurance programs. For example, brokers such as Lockton frequently paid success-based

[39] *See* Ex. E at ¶ 22.

royalties to their affinity clients, which DFS would later assert violated New York Insurance Law § 2116. Insurance coverage for the cost of psychological counseling had become increasingly pervasive outside a standard health-insurance context, yet DFS argues that providing such insurance violates New York Insurance Law § 2117. Similarly, DFS takes the position that the financial condition or "rating" of an out-of-state, excess-line insurer may not be advertised as a means to promote the policy—but this practice was common in the affinity-insurance marketplace in 2017. And although New York Insurance Law § 3420 sets forth various minimum requirements for liability insurance which protects persons and property, many policies failed to meet those requirements. It is clear that confusion existed among brokers regarding the mechanics of compliance with New York Insurance Law § 2118, which requires brokers to secure declinations from authorized insurers before placing surplus-line insurance.

66. Confronted with a marketplace where brokerage practices frequently departed from the regulators' preferred reading of certain statutes, Defendants could have issued informative guidance, or adopted an even-handed enforcement approach. Instead, Defendants selectively used these purported infractions to target the NRA, while disregarding other instances of the same conduct of which they were aware. (When Defendants did issue guidance letters to regulated institutions in April 2018, the letters reflected their enforcement approach: ignore excess-line declinations,

out-of-state-carrier ratings, and other technical insurance-policy features while "urging" financial institutions to cut ties with gun groups).

67. Although DFS's investigation of the NRA, launched at Cuomo and Everytown's behest, had originally focused on Carry Guard, that changed by February 2018. In the aftermath of the Parkland tragedy, Vullo met with senior executives of Lloyd's and LAI, and presented Defendants' views on gun control and their desire to leverage their powers to combat the availability of firearms, including specifically by weakening the NRA. These backchannel meetings began on or about February 27, 2018, after Vullo spoke at a breakfast meeting of the New York City Bar Association; participants included Vullo herself, along with Inga Beale of Lloyd's and Joseph Gunset of LAI.

68. Sometimes referred to as an insurance underwriter, Lloyd's is actually an insurance marketplace, composed of "members which underwrite insurance (each for their own account) as members of syndicates."[40] Various supervisory bodies and boards within

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[40] *See Lloyd's of London in Study for N.Y. Insurance Market*, DealBook, N.Y. TIMES (March 25, 2010), https://dealbook.nytimes.com/2010/03/25/lloyds-of-london-in-study-for-n-y-insurance-market/; *see also The Lloyd's Market*, LLOYD'S, https://www.lloyds.com/aboutlloyds/what-is-lloyds/the-lloyds-market (last visited April 18, 2019), https://www.lloyds.com/about-lloyds/what-is-lloyds/the-lloyds-market (describing the structure of the Lloyd's market). Entities known as "managing agents" manage the Lloyd's syndicates on behalf of Lloyd's members. The individual Lloyd's syndicates and managing agents that served the NRA, and were targeted by DFS are: AUW 0609; BRT 2987; CNP 0958; CNP

Lloyd's set policies for the Lloyd's syndicates, and can issue directives that shape the availability of different types of insurance worldwide. Like most of the insurance industry, Lloyd's generally does not shy away from providing insurance that may be controversial—for example, to this day, Lloyd's syndicates are permitted to underwrite coverage for religious sexual abuse liability.[41] However, despite being based in London, Lloyd's is extremely sensitive to pressure from the New York regulators, and concerned about "reputational risks" that may incur DFS's disfavor. Since World War II, when Lloyd's sought to protect policyholders from the consequences of German attacks on England, all premiums paid by Lloyd's policyholders have deposited into trust funds in the State of New York, through a structure known as the Lloyd's America Trust Fund ("LATF"). The LATF is directly regulated by DFS, and totals tens of billions of dollars—providing massive collateral for whatever demands DFS may impose.[42]

4444; CSL 1084; GER 1206; KLN 0510; LIB 4472; ROC 1200; SAM 0727; AmTrust Syndicates Limited; Argo Managing Agency Limited; Atrium Underwriters Limited; Brit Syndicates Limited; Canopius Managing Agents Limited; Chaucer Syndicates Limited; Liberty Managing Agency Limited; S.A. Meacock & Company Limited; Tokio Marine Kiln Syndicates Limited. All are located in the United Kingdom.

[41] *See*, *e.g.*, http://www.britinsurance.com/~/media/files/us%20flyers%20new/public%20entity%20%20non%20profit%20sir%20package.ashx.

[42] *See In re Lloyd's Am. Tr. Fund Litig.*, 928 F. Supp. 333, 336 (S.D.N.Y. 1996) (discussing the LATF structure and certain

69. During her surreptitiously held meetings with Lloyd's executives that commenced in February 2018, Vullo acknowledged the widespread regulatory issues in the excess-line marketplace. Vullo and DFS made clear that Lloyd's could avoid liability for infractions relating to other, similarly situated insurance policies, so long as it aided DFS's campaign against gun groups. Against the specter of this bold abuse of her position, Lloyd's agreed that it would instruct its syndicates to cease underwriting firearm-related policies and would scale back its NRA-related business; in exchange, DFS would focus its forthcoming affinity-insurance enforcement action solely on those syndicates which served the NRA, and ignore other syndicates writing similar policies. The first step of this choreographed process was a letter from DFS to Gunset, an LAI executive, sent on April 11, 2018.[43]

70.On May 1, 2018, Lloyd's held a meeting of its Board of Directors. Among the topics discussed at the meeting were [redacted]

relevant regulations administered by DFS's predecessor agency, the New York Department of Insurance).

[43] Ex. F and Sealed Exhibit B.

[redacted].[44]

71. On May 9, 2018, Lloyd's sent a notice to its managing agents who are responsible for all insurance policies written through the Lloyd's marketplace (the "May 9 Notice").[45] The May 9 Notice [redacted][46]

72. Also on May 9, 2018, Lloyd's publicly announced that it had directed its underwriters to terminate all insurance related to the NRA and not to provide any insurance to the NRA in the future, in the wake of DFS's investigations into the NRA and its business partners.[47]

73. By June 30, 2018, the Lloyd's managing agents and syndicates had provided materials to DFS that DFS requested in the April 11, 2018 letter.

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[44] *Id.*

[45] Ex. H and Sealed Exhibit D.

[46] *Id.*

[47] *See*, *e.g.*, *Lloyd's Underwriters Told to Stop Insurance Linked to NRA*, THE NEW YORK TIMES (May 9, 2018), https://www.nytimes.com/reuters/2018/05/09/business/09reuters-lloyds-of-london-nra.html.

74. On December 20, 2018, ten Lloyd's underwriters, acting through their managing agents, entered into a Consent Order Under Sections 1102 and 3420 of the Insurance Law (the "Lloyd's Consent Order") with DFS—signed by Vullo—which imposes a civil monetary penalty of $5 million.[48] Similar to the Lockton and Chubb Consent Orders, in the Lloyd's Consent Order, DFS overextends its authority and purports to restrict Lloyd's participation in ***any*** affinity-type insurance program with the NRA, irrespective of whether such programs comply with the Insurance Law.[49]

75. Pursuant to the conversations between Vullo and DFS with senior officials at Lloyd's and LAI described above, Lloyd's was not subjected to any enforcement action and/or penalties for any violation of the New York Insurance Law related to affinity-insurance programs, other than in connection with the NRA-related insurance programs.

76. Importantly, Lloyd's was not the only entity with direct exposure to DFS's selective enforcement scheme. DFS also became specifically cognizant of non-NRA policies that exhibited the same purported defects as NRA policies—and chose to ignore those violations, targeting solely the NRA—in the context of its Lockton investigation. [redacted]

[48] The Lloyd's Consent Order is attached hereto as Exhibit I.

[49] *See* Ex. I at ¶ 20.

[redacted] DFS verbally conveyed to Lockton that it was only interested in pursuing the NRA. Other programs exhibiting the same issues, DFS explained, could be quietly remediated by Lockton after consent order and penalty targeting NRA programs had been publicized.

77. Consistent with this agreement, on July 2, 2018, Lockton provided a report to DFS regarding the status of its remediation efforts for non-NRA programs. [redacted]

78. [redacted]. In response, DFS took no action whatsoever against any of Lockton's non-NRA clients. On January 31, 2019, almost three months after this Court had sustained the NRA's selective-enforcement claims and permitted discovery regarding them, DFS entered into a Supplemental Consent Order with Lockton that purported to admonish violations of the same statutes by Lockton's

non-NRA clients, yet did not identify the clients by name or require Lockton to cease doing business with them.[50]

79. DFS's selective enforcement continues to this day. While taking no action against any of Lockton's other affinity clients, or the underwriters involved in those policies, DFS recently subpoenaed an underwriter known as AGIA which backs health-insurance policies administered and brokered by Lockton for the NRA. These policies have nothing to do with firearms and are identical in all material respects to policies administered and brokered by Lockton on behalf of non-NRA clients.

4. Defendants' Actions Are Causing Other Financial Institutions To Re-Evaluate Their Relationships With The NRA For Fear Of Significant Adverse Action By Defendants.

80. Defendants' concerted efforts to stifle the NRA's freedom of speech and to retaliate against the NRA based on its viewpoints are causing other insurance, banking, and financial institutions doing business with the NRA to rethink their mutually beneficial business relationships with the NRA for fear of monetary sanctions or expensive public investigations.

81. The NRA has encountered serious difficulties obtaining corporate insurance coverage to replace

[50] Ex. J.

coverage withdrawn by the Corporate Carrier. The NRA has spoken to numerous carriers in an effort to obtain replacement corporate insurance coverage; nearly every carrier has indicated that it fears transacting with the NRA specifically in light of DFS's actions against Lockton, Chubb, and Lloyd's.

82. Defendants' threats have also imperiled the NRA's access to basic banking services, despite the absence of any alleged regulatory violations in connection with the NRA's banking activities. Multiple banks withdrew their bids in the NRA's RFP process following the issuance of the April 2018 Letters, based on concerns that any involvement with the NRA—even providing the organization with basic depository services—would expose them to regulatory reprisals.

83. Defendants' campaign is achieving its intended chilling effect on banks throughout DFS's jurisdiction. Speaking "on the condition of anonymity," one community banker from Upstate New York told *American Banker* magazine that in light of the apparent "politically motivated" nature of the DFS guidance, "[i]t's hard to know what the rules are" or whom to do business with, because bankers must attempt to anticipate "who is going to come into disfavor with the New York State DFS" or other regulators.[51] Other industry sources told *American Banker* that, "such regulatory guidelines are frustratingly vague, and can effectively

[51] Neil Haggerty, *Gun issue is a lose-lose for banks (whatever their stance)*, AMERICAN BANKER (Apr. 26, 2018, 1:11 PM), https://www.americanbanker.com/news/gun-issue-is-a-loselose-for-banks-whatever-their-stance.

compel institutions to cease catering to legal businesses."[52]

84. The NRA has suffered tens of millions of dollars in damages based on Defendants' conduct described above. Such damages include, without limitation, damages due to reputational harm, increased development and marketing costs for any potential new NRA-endorsed insurance programs, and lost royalty amounts owed to the NRA, as well as attorneys' fees, legal expenses, and other costs.

85. If the NRA is unable to collect donations from its members, safeguard the assets endowed to it, apply its funds to cover media buys and other expenses integral to its political speech, and obtain basic corporate insurance coverage, it will be unable to exist as a not-for-profit or pursue its advocacy mission. Defendants seek to silence one of America's oldest constitutional rights advocates. If their abuses are not enjoined, they will soon, substantially, succeed.

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[52] *Id.*

V.

CLAIMS

A. Count One: Violation Of The NRA's First And Fourteenth Amendment Rights Under 42 U.S.C. § 1983, And Article 1, Section 8 Of The New York Constitution By The Establishment Of An Implicit Censorship Regime (As To All Defendants).

86. The NRA repeats and re-alleges each and every allegation in the preceding paragraphs as though fully set forth herein.

87. The First Amendment, which applies to Defendants by operation of the Fourteenth Amendment, and Section Eight of the New York Constitution secure the NRA's right to free speech, including its right to express its viewpoints and political beliefs regarding the constitutionally protected right to keep and bear arms.

88. The NRA has a longstanding history of political advocacy advancing the Second Amendment rights of all Americans. Although Cuomo and Vullo disagree with and oppose the NRA's political views, the NRA's freedom to express its views with respect to the gun-control debate is a fundamental right protected by the First Amendment.

89. Defendants have regulatory authority over financial institutions and insurance entities that have done or are doing business with or are otherwise

associated with the NRA, including Chubb, Lockton, and Lloyd's.

90. Defendants' actions—including but not limited to the issuance of the April 2018 Letters and the accompanying backroom exhortations, the imposition of the Consent Orders upon Chubb, Lockton and Lloyd's, and the issuance of the Cuomo Press Release—established a "system of informal censorship" designed to suppress the NRA's speech.[53]

91. Defendants' actions were for the purpose of suppressing the NRA's pro-Second Amendment viewpoint. Defendants undertook such unlawful conduct with the intent to obstruct, chill, deter, and retaliate against the NRA's core political speech.

92. Defendants' unlawful exhortations to New York insurance companies, banks, and financial institutions that they, among other things, "manag[e] their risks, including reputational risks, that may arise from their dealings with the NRA . . . , as well as continued assessment of compliance with their own codes of social responsibility[,]" as well as "review any relationships they have with the NRA[,]" and "take prompt actions to managing these risks and promote public health and safety[,]" constitute a concerted effort to deprive the NRA of its freedom of speech by threatening with government prosecution services critical to the survival of the NRA and its ability to disseminate its message. Far from protected government speech,

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[53] *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 71 (1963).

Defendants' actions constitute an "implied threat[] to employ coercive state power" against entities doing business with the NRA, and they are reasonably interpreted as such.[54]

93. Defendants' concerted efforts to stifle the NRA's freedom of speech caused financial institutions doing business with the NRA to end their business relationships, or explore such action, due to fear of monetary sanctions or expensive public investigations. For example, Defendants coerced and caused Lockton, Chubb, and Lloyd's to cease their participation in NRA-endorsed insurance programs, regardless of whether the insurance programs met all legal qualifications under New York's Insurance Law.

94. Defendants' unlawful and intentional actions are not justified by a substantial or compelling government interest and are not narrowly tailored to serve any such interest.

95. Defendants' intentional actions resulted in significant damages to the NRA, including but not limited to damages due to reputational harm, increased development and marketing costs for any potential new NRA-endorsed insurance programs, and lost royalty amounts owed to the NRA.

96. The NRA is also entitled to an award of attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and New York Civil Practice Law and Rules § 8601.

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[54] *Okwedy v. Molinari*, 333 F.3d 339, 342 (2d Cir. 2003).

97. In addition to the above-described damages, absent an injunction against Defendants, the NRA will suffer irrecoverable loss and irreparable harm if it is unable to acquire insurance or other banking services due to Defendants' actions. Accordingly, the NRA seeks an order preliminarily and permanently enjoining Cuomo and Vullo (in their official capacities) and DFS—including its officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction—from threatening or encouraging insurance companies, banks, or financial institutions to sever ties with or discontinue services to the NRA.

B. Count Two: Violation Of The NRA's First And Fourteenth Amendment Rights Under 42 U.S.C. § 1983 And Article 1, Section 8 Of The New York Constitution By Retaliating Against The NRA Based On Its Speech (As To All Defendants).

98. The NRA repeats and re-alleges each and every allegation in the preceding paragraphs as though fully set forth herein.

99. The First Amendment, which applies to Defendants by operation of the Fourteenth Amendment, and Section Eight of the New York Constitution, secures the NRA's right to free speech, including its right to express its viewpoints and political beliefs regarding the constitutionally protected right to keep and bear arms.

100. The NRA has a longstanding history of political advocacy advancing the Second Amendment rights of all Americans. Although Cuomo and Vullo disagree with and oppose the NRA's political views, the NRA's freedom to express its views with respect to the gun-control debate is a fundamental right protected by the First Amendment.

101. Defendants' actions—including but not limited to the issuance of the April 2018 Letters and the accompanying backroom exhortations, the imposition of the Consent Orders upon Chubb, Lockton and Lloyd's, and the issuance of the Cuomo Press Release—were in response to and substantially caused by the NRA's political speech regarding the right to keep and bear arms. Defendants' actions were for the purpose of suppressing the NRA's pro-Second Amendment viewpoint. Defendants undertook such unlawful conduct with the intent to obstruct, chill, deter, and retaliate against the NRA's core political speech.

102. Defendants' actions have concretely harmed the NRA by causing financial institutions doing business with the NRA to end their business relationships, or explore such action, due to fear of monetary sanctions or expensive public investigations. For example, Defendants coerced and caused Lockton, Chubb, and Lloyd's to cease their participation in NRA-endorsed insurance programs in New York and elsewhere, regardless of whether the insurance programs met all legal qualifications under New York's Insurance Law.

103. Defendants had discretion in deciding whether and how to carry out their actions, including but not limited to the types of demands imposed on Chubb, Lockton and Lloyd's in the Consent Orders, whether to issue the Cuomo Press Release, and the type of guidance provided in the April 2018 Letters. They exercised this discretion to harm the NRA because of the NRA's speech regarding the Second Amendment.

104. Defendants' unlawful and intentional actions are not justified by a substantial or compelling government interest and are not narrowly tailored to serve any such interest.

105. Defendants' intentional actions resulted in significant damages to the NRA, including but not limited to damages due to reputational harm, increased development and marketing costs for any potential new NRA-endorsed insurance programs, and lost royalty amounts owed to the NRA.

106. The NRA is also entitled to an award of attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and New York Civil Practice Law and Rules § 8601.

107. In addition to the above-described damages, absent an injunction against Defendants, the NRA will suffer irrecoverable loss and irreparable harm if it is unable to acquire insurance or other financial services due to Defendants' actions. Accordingly, the NRA seeks an order permanently enjoining Cuomo, Vullo, and DFS—including its officers, agents, servants, employees, and all persons in active concert or participation

with them who receive actual notice of the injunction—from threatening or encouraging insurance companies, banks, or financial institutions to sever ties with or discontinue services to the NRA.

C. Count Three: Violation Of The Equal Protection Clause Of The Fourteenth Amendment Under 42 U.S.C. § 1983, And Article 1, Section 11 Of The New York Constitution (As To Vullo).

108. The NRA repeats and re-alleges each and every allegation in the preceding paragraphs as though fully set forth herein.

109. Vullo knowingly and willfully violated the NRA's equal protection rights by seeking to selectively enforce certain provisions of the Insurance Law against Lockton's affinity-insurance programs for the NRA. Meanwhile, other affinity-insurance programs that were identically (or at least similarly) marketed by Lockton, but not endorsed by "gun promotion" organizations, have not been targeted by DFS's investigation.

110. Vullo was aware during the investigations of the NRA and its business partners that these other identical (or at least similar in all material respects) affinity-insurance programs had the same legal infirmities that resulted in the penalties against Lockton, Chubb, and Lloyd's related solely to the NRA-related affinity-insurance programs. Specifically, Vullo was aware of these comparators from her involvement in

the conversations she had with senior officials of Lloyd's in the spring of 2018 described above.

111. Alternatively, Vullo should have known of similarly situated individuals at the time DFS launched its investigation and any purported lack of knowledge was due to a "see-no-evil" policy of enforcement, which Vullo and DFS abandoned solely to further their vendetta against the NRA. The "see-no-evil" enforcement policy was confirmed by DFS's continued ignorance toward the violations of the similarly situated comparators.

112. By virtue of the position held by Vullo at the time DFS launched its investigation, Vullo knew the actions taken by DFS against NRA affinity insurance programs were unprecedented. No other similarly situated programs have faced even close to the same treatment for analogous violations. However, Vullo and DFS failed to inquire about whether there were any other similarly situated affinity programs when the investigation was launched.

113. There is an extremely high level of similarity between the NRA-related affinity-insurance programs and those of the comparator affinity-insurance programs, including AOAExcel, Moose, the VFW, and the PPA, such that no rational person would perceive the NRArelated programs to be different enough to justify the differential treatment by Vullo and DFS.

114. Vullo and DFS discriminated against the NRA and its business partners because of Vullo's

personal animus toward the NRA and its Second Amendment advocacy.

115. The similarity between the NRA-related programs and the comparators and the sharp differences in Vullo's and DFS's treatment of them are sufficient to exclude the possibility that Vullo and DFS acted on the basis of a mistake.

116. Alternatively, there is at least a reasonably close resemblance between the NRA-related affinity-insurance programs and those of the comparator affinity-insurance programs, including AOAExcel, Moose, the VFW, and the PPA.

117. The disparate treatment of the NRA-related programs and the comparators was caused by Vullo's intent to punish and/or inhibit the NRA because of the NRA's constitutionally protected speech.

118. Vullo's selective enforcement of the Insurance Law against the NRA and its business partners has been knowing, willful, arbitrary, capricious, unreasonable, discriminatory, and undertaken in bad faith and without a rational basis. Vullo's conduct does not further any legitimate government interest.

119. Vullo's selective enforcement of the Insurance Law against the NRA and its business partners is based on the NRA's political views and speech relating to the Second Amendment. These considerations are impermissible bases for an enforcement action.

120. Vullo's actions have resulted in significant damages to the NRA, including but not limited to

damages due to reputational harm, increased development and marketing costs for any potential new NRA-endorsed insurance programs, and lost royalty amounts owed to the NRA.

121. The NRA is also entitled to an award of attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and New York Civil Practice Laws and Rules § 8601.

VI.

DEMAND FOR JURY TRIAL

122. The NRA hereby demands a trial by jury on all issues so triable.

VII.

REQUEST FOR RELIEF

WHEREFORE the NRA respectfully requests that the Court enter judgment in the NRA's favor and against Defendants, as follows:

a. Declaring, pursuant to 28 U.S.C. § 2201, that Defendants have violated the NRA's rights to free speech and equal protection under both the Federal and New York Constitutions;

b. Granting a preliminary and permanent injunction, pursuant to 28 U.S.C. § 1651(a), 42 U.S.C. § 1983, and Rule 65 of the Federal Rules of Civil Procedure, ordering DFS, its agents, representatives, employees and servants and all persons and entities in

concert or participation with it, Cuomo (in his official capacity) and the current Superintendent of DFS (in her/his official capacity):

(1) to immediately cease and refrain from engaging in any conduct or activity which has the purpose or effect of interfering with the NRA's exercise of the rights afforded to it under the First and Second Amendment to the United States Constitution and Section 8 to the New York Constitution; and

(2) to immediately cease and refrain from engaging in any conduct or activity which has the purpose or effect of interfering with, terminating, or diminishing any of the NRA's contracts and/or business relationships with any organizations;

b. Granting such other injunctive relief to which the NRA is entitled;

c. Awarding the NRA actual damages, including compensatory and consequential damages, in an amount to be determined at trial;

d. Awarding the NRA exemplary or punitive damages;

e. Awarding the NRA prejudgment and post judgment interest at the highest lawful rates;

f. Awarding the NRA such costs and disbursements as are incurred in prosecuting this action, including reasonable attorneys' and experts' fees; and

g. Granting the NRA such other and further relief as this Court deems just and proper.

Respectfully submitted,

By: /s/ Sarah B. Rogers

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CERTIFICATE OF SERVICE

I certify that on June 2, 2020, I caused a copy of the foregoing to be served upon the following counsel electronically through the ECF system:

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Sarah B. Rogers

[LOGO] NEW YORK STATE

DEPARTMENT OF FINANCIAL SERVICES

Press Release

April 19, 2018

Contact: Richard Loconte, 212-709-1691

Governor Cuomo Directs Department of Financial Services to Urge Companies to Weigh Reputational Risk of Business Ties to the NRA and Similar Organizations

Insurance Companies, Banks, and Other Financial Institutions Encouraged to Review Relationships with the NRA and Similar Organizations

Governor Andrew M. Cuomo today directed the Department of Financial Services to urge insurance companies, New York State-chartered banks, and other financial services companies licensed in New York to review any relationships they may have with the National Rifle Association and other similar organizations. Upon this review, the companies are encouraged to consider whether such ties harm their corporate reputations and jeopardize public safety.

"New York may have the strongest gun laws in the country, but we must push further to ensure that gun safety is a top priority for every individual, company, and organization that does business across the state," **Governor Cuomo said**. "I am directing the Department of Financial Services to urge insurers and

bankers statewide to determine whether any relationship they may have with the NRA or similar organizations sends the wrong message to their clients and their communities who often look to them for guidance and support. This is not just a matter of reputation, it is a matter of public safety, and working together, we can put an end to gun violence in New York once and for all."

DFS is encouraging regulated entities to consider reputational risk and promote corporate responsibility in an effort to encourage strong markets and protect consumers. A number of businesses have ended relationships with the NRA following the Parkland, Florida school shooting in order to realign their company's values. MetLife, a major insurer regulated by DFS, recently announced it was ending a discount program it offered with the NRA and Chubb, another DFS-regulated insurer, recently stopped underwriting the NRA-branded "Carry Guard" insurance program.

Financial Services Superintendent Maria T. Vullo said, "Corporations are demonstrating that business can lead the way and bring about the kind of positive social change needed to minimize the chance that we will witness more of these senseless tragedies. DFS urges all insurance companies and banks doing business in New York to join the companies that have already discontinued their arrangements with the NRA, and to take prompt actions to manage these risks and promote public health and safety.

DFS regulates more than 1,400 insurance companies with assets of $4.3 trillion. These include 200 life insurers, 1,100 property casualty insurers, and 100 health insurance companies.

Click here for a copy of the DFS guidance that was sent to all DFS-regulated insurers and here for guidance sent to all DFS-regulated banks.

Contact the Governor's Press Office

Contact us by phone:

Albany: (518) 474-8418
New York City: (212) 681-4640

Contact us by email:

Press.Office@exec.ny.gov

NEW YORK
STATE OF OPPORTUNITY | Department of
Financial Services

MEMORANDUM

TO: The Chief Executive Officers or Equivalents of All Insurers Doing Business in the State of New York

FROM: Maria T. Vullo, Superintendent of Financial Services

DATE: April 19, 2018

RE: Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations

The New York State Department of Financial Services is issuing this guidance in the wake of several recent horrific shootings, including in Parkland, Florida that left 17 students and staff members at Marjory Stoneman Douglas High School dead. This was only one of many prior gun violence tragedies, including those in Columbine High School, Sandy Hook, Pulse night club, and the Las Vegas music festival, that left many innocent people dead.

While the social backlash against the National Rifle Association (the "NRA"), and similar organizations that promote guns that lead to senseless violence, has in the past been strong, the nature and the intensity of the voices now speaking out, including the voices of the passionate, courageous, and articulate young people who have experienced this recent horror first hand, is a strong reminder that such voices can no longer be

ignored and that society, as a whole, has a responsibility to act and is no longer willing to stand by and wait and witness more tragedies caused by gun violence, but instead is demanding change now.

Our insurers are, and have been, vital to the communities they serve for generations and are guided by their commitment to corporate social responsibility, including public safety and health. Insurers' engagement in communities they serve is closely tied to the business they do with their clients and customers and its impact on such communities. Often insurers report to their stakeholders that their performance is based on both their strategic business vision as well as on a commitment to society as a whole. There is a fair amount of precedent in the business world where firms have implemented measures in areas such as the environment, caring for the sick, and civil rights in fulfilling their corporate social responsibility. The recent actions of a number of financial institutions that severed their ties with the NRA after the AR-15 style rifle killed 17 people in the school in Parkland, Florida is an example of such a precedent.

The tragic devastation caused by gun violence that we have regrettably been increasingly witnessing is a public safety and health issue that should no longer be tolerated by the public and there will undoubtedly be increasing public backlash against the NRA and like organizations.

Our insurers are key players in maintaining and improving public health and safety in the communities

they serve. They are also in the business of managing risks, including their own reputational risks, by making risk management decisions on a regular basis regarding if and how they will do business with certain sectors or entities. In light of the above, and subject to compliance with applicable laws, the Department encourages its insurers to continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations, if any, as well as continued assessment of compliance with their own codes of social responsibility. The Department encourages regulated institutions to review any relationships they have with the NRA or similar gun promotion organizations, and to take prompt actions to managing these risks and promote public health and safety.

/s/ Maria T. Vullo
Maria T. Vullo
Superintendent of Financial Services

NEW YORK
STATE OF OPPORTUNITY | Department of
Financial Services

MEMORANDUM

TO: The Chief Executive Officers or Equivalents of New York State Chartered or Licensed Financial Institutions

FROM: Maria T. Vullo, Superintendent of Financial Services

DATE: April 19, 2018

RE: Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations

The New York State Department of Financial Services is issuing this guidance in the wake of several recent horrific shootings, including in Parkland, Florida that left 17 students and staff members at Marjory Stoneman Douglas High School dead. This was only one of many prior gun violence tragedies, including those in Columbine High School, Sandy Hook, Pulse night club, and the Las Vegas music festival, that left many innocent people dead.

While the social backlash against the National Rifle Association (the "NRA") and similar organizations that promote guns that lead to senseless violence has in the past been strong, the nature and the intensity of the voices now speaking out, including the voices of the passionate, courageous, and articulate young people who have experienced this recent horror first hand, is a strong reminder that such voices can no longer be

ignored and that society, as a whole, has a responsibility to act and is no longer willing to stand by and wait and witness more tragedies caused by gun violence, but instead is demanding change now.

Our financial institutions, whether depository or non-depository, are, and have been, the cornerstone of the communities they serve for generations and are guided by their commitment to corporate social responsibility, including public safety and health. The manner by which financial institutions engage in communities they serve is closely tied to the business they do with their clients and customers and its impact on such communities. In fact, a review of performance reports of many firms to their stakeholders demonstrates how their performance is based on both their strategic business vision as well as on a commitment to society as a whole. There is a fair amount of precedent in the business world where firms have implemented measures in areas such as the environment, healthcare, and civil rights in fulfilling their corporate social responsibility. The recent actions of a number of financial institutions that severed their ties with the NRA and have taken other actions after the AR-15 style rifle killed 17 people in the school in Parkland, Florida is an example of such a precedent.

The tragic devastation caused by gun violence that we have regrettably been increasingly witnessing is a public safety and health issue. Our financial institutions can play a significant role in promoting public health and safety in the communities they serve, thereby fulfilling their corporate social responsibility

to those communities. They are also in the business of managing risks, including their own reputational risks, by making risk management decisions on a regular basis regarding if and how they will do business with certain sectors or entities. In light of the above, and subject to compliance with applicable laws, the Department encourages its chartered and licensed financial institutions to continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations, if any, as well as continued assessment of compliance with their own codes of social responsibility. The Department encourages regulated institutions to review any relationships they have with the NRA or similar gun promotion organizations, and to take prompt actions to managing these risks and promote public health and safety.

/s/ Maria T. Vullo
Maria T. Vullo
Superintendent of Financial Services

NEW YORK STATE DEPARTMENT
OF FINANCIAL SERVICES

In the Matter of

LOCKTON AFFINITY, LLC and
LOCKTON COMPANIES, LLC

**CONSENT ORDER UNDER
ARTICLES 21, 23 AND 34
OF THE INSURANCE LAW**

(Filed May 2, 2018)

Lockton Affinity, LLC, on behalf of each of its separate operating series, one of which, Lockton Affinity Series of Lockton Affinity, LLC, is the successor entity to Lockton Risk Services, Inc. ("Lockton Affinity"), Lockton Companies, LLC, on behalf of each of its separate operating series ("Lockton Companies") (together, Lockton Affinity and Lockton Companies, "Lockton"), and the New York Department of Financial Services (the "Department") (collectively, the "Parties") are willing to resolve the matters described herein without further proceedings.

**THE DEPARTMENTS FINDINGS
FOLLOWING INVESTIGATION**

1. Lockton, together with its affiliates, is the world's largest privately owned, independent insurance brokerage firm, offering customers risk management, insurance and employee benefits services. At least one Lockton affiliate has been licensed by the

Department since approximately 1987, and Lockton Affinity has been licensed by the Department to act as an insurance producer, including as an excess line broker, since at least 2013.

2. Illinois Union Insurance Company ("Illinois Union") is an unauthorized insurer eligible to write excess lines insurance in New York State. It is a subsidiary of Chubb Ltd., and in connection with the "Carry Guard" program discussed herein, Illinois Union held itself out to the public simply as "Chubb" (hereinafter, "Chubb").

3. Lloyd's of London is an insurance market encompassing more than 50 insurance companies, over 200 registered brokers, and global network of over 4,000 local agents who manage these arrangements, known as "coverholders."[1] The Lloyd's market is backed by the Lloyd's Corporation (hereinafter, together with Lloyd's of London, collectively referred to as "Lloyd's").

4. The National Rifle Association of America ("NRA") is a New York not-for-profit corporation incorporated in 1871. The NRA describes its mission as "firearms safety, education, and training and advocacy on behalf of safe and responsible gun owners." The NRA is not licensed by the Department.

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[1] A "coverholder" in the Lloyd's syndicate is an insurance intermediary authorized by a managing agent to enter into contracts of insurance to be underwritten by the members of a syndicate managed by it, in accordance with the terms of a binding authority. *See* https://www.lloyds.com/lloyds-around-the-world/europe/switzerland/becoming-an-intermediary-and-coverholder.

The Carry Guard Program

5. From approximately April through November 2017, Lockton Affinity and the NRA offered an insurance program to new and existing NRA members in New York and elsewhere called "Carry Guard." During that time, the NRA's website described the program as follows:

> ***NRA Carry Guard is a two-pronged program. It was created to provide dynamic, state-of-the-art insurance protection to those who legally defend themselves with a firearm, and to offer an elite, one-stop training option. The insurance provides a cutting edge set of features that will help gun owners mitigate the potentially costly financial and legal consequences flowing from armed encounters, even if they did everything right.***

6. The NRA website further described the Carry Guard program as "the only membership carry program ***developed and supported by the National Rifle Association***, the most powerful civil rights organization in American history." The website further stated that Carry Guard was "***created by the NRA***."

7. Additional promotional materials disseminated by the NRA stated:

> **Why do I need Carry Guard?** Although millions of Americans are prepared to use a firearm in self-defense, very few families can withstand the financial consequences that may come next. The legal fees to clear your

> good name could be enormous. Likewise, the costs of defending and potentially losing a civil lawsuit could cripple your finances for the rest of your life. ***And many homeowners' policies have severe limitations or exclusions related to intentional acts such as self-defense.***

These materials stated at the bottom of the page: "NRA CARRY GUARD™ Insurance Program Administered by Lockton Affinity, LLC • D/B/A/ Lockton Affinity Insurance Brokers, LLC."

8. Pursuant to written agreements with Chubb and the NRA, Lockton Affinity served as the administrator for the Carry Guard program, carrying out such functions as marketing the insurance, binding the insurance, collecting and distributing premiums, and delivering policies to insureds.

9. Pursuant to written agreements with Lockton Affinity, Chubb – through its Illinois Union subsidiary – served as the underwriter for the Carry Guard insurance program, providing insurance policies to individuals who purchased Carry Guard insurance. According to the marketing and promotion website for the Carry Guard program, www.nracarryguard.com (in effect from April to mid-December 2017), the Carry Guard insurance program "***is backed by insurance leader Chubb***" and is underwritten by a "***group within Chubb the world's largest publicly traded property and casualty insurance company***." The Carry Guard insurance program is referred to herein as the "Carry Guard Program."

10. The Carry Guard Program tied insurance to free NRA membership, in violation of the New York Insurance Law (the "Insurance Law"). When purchasing Carry Guard insurance, members would also receive one year of free NRA membership. The NRA membership benefit was not specified in the insurance policy, and one year of membership exceeded $25 in market value. The NRA directly managed the membership aspect of the Carry Guard program.[2]

11. Lockton Affinity placed these insurance policies through New York's excess line market. Excess line coverage offers policyholders an opportunity to obtain insurance that could not be procured from an authorized insurer. An "authorized insurer" is an insurance company that has received a license from the Department to provide specified types of insurance to customers in New York. Authorized insurers are fully regulated by the Department in order to ensure solvency and adherence to consumer protection standards.

12. Excess line insurers are not licensed or authorized by the Department, but are permitted to do business in New York through an excess line broker. Unless another exemption applies, an insurance policy may be procured from an excess line insurer only after

[2] In the event the purchaser was already an NRA member, the Carry Guard program allowed the member to carry a credit for a free one year membership forward, or allowed a transfer of the credit to a family member for use in obtaining NRA membership at no cost.

an excess line broker has obtained declinations of coverage from three authorized insurers.

13. The Carry Guard insurance program, as underwritten by Chubb and administered, solicited and marketed by Lockton Affinity, provided insurance coverage that may not be offered in the New York State excess line market, specifically: (a) defense coverage in a criminal proceeding that is not permitted by law; (b) liability coverage for bodily injury or property damage expected or intended from the insured's standpoint in an insurance policy limited to use of firearms and that was beyond the use of reasonable force to protect persons or property; and (c) coverage for expenses incurred by the insured for psychological counseling support.

14. Moreover, although it did not possess an insurance producer license from the Department, the NRA nonetheless engaged in aggressive marketing of and solicitation for the Carry Guard Program. For example (and without limitation):

- The NRA broadcasted NRA-produced videos promoting the Carry Guard Program on YouTube;
- The NRA solicited participation in the Carry Guard Program through mass e-mail marketing, direct mail, banner ads, and articles in NRA publications;
- The NRA heavily promoted the Carry Guard Program at its 2017 "Carry Guard Expo" and its annual meetings;

- The NRA operated the website "www.nracarryguard.com," which was an important marketing portal for the Carry Guard Program and linked to a website operated by Lockton Affinity (www.lockton.nracarryguard.com), which provided additional information about the Carry Guard Program;
- The NRA promoted Carry Guard insurance on its main website, www.nra.org, which, among other things, featured an NRA spokesperson making claims such as, "***We're proud to have developed*** the one carry membership program that stands above all others – NRA Carry Guard"; and "I will never carry a gun without carrying this."
- "Pop-up" internet advertising for the Carry Guard Program that featured one or more NRA spokespersons.

Other NRA-Endorsed Programs

15. From approximately January 2000 through March 2018, Lockton Affinity and the NRA together offered at least 11 additional insurance programs to new and existing NRA members in New York and elsewhere, including:

a. "Retired Law Enforcement Officer Self-Defense Insurance," which provided coverage for criminal and civil defense costs, and bodily injury and damage caused by the use of a firearm;

b. "ArmsCare Plus Firearms Insurance," which provided coverage for legal firearms and attached

accessories against loss, damage, flood, fire, and theft (including theft from a locked vehicle);

c. "No Cost ArmsCare Firearms Insurance," which provided free coverage to NRA members in good standing for legal firearms and their attached accessories, up to $2,500 in value, against loss, damage, flood, fire, and theft (including theft from a locked vehicle);

d. "Firearms Instructor Plus Liability Insurance," which provided coverage for injuries or damage the insured causes while acting as an instructor during a lesson, medical expenses up to $5,000, legal expenses from lawsuits related to the injuries or damage, and professional liability coverage that protects the member from allegations of negligent training;

e. "Personal Firearms Protection Insurance," which provided coverage for any unintentional injuries or damage an insured causes while hunting or trapping on public or private land, shooting in competitions, or shooting at private shooting ranges, with a firearm, air gun, bow and arrow, or trapping equipment, and coverage for lawsuit defense costs;

f. "Gun Collector Insurance," which provided coverage for certain firearms and their attached accessories against loss, damage, fire, and theft (including theft from a locked vehicle);

g. "Gun Club Insurance," which provided coverage for loss or damage to any assets the gun club rents, leases or owns, coverage for general liability plus medical payments, coverage for claims of false advertising, and optional coverage for business income, boiler and machinery, glass, computers, valuable papers and records, and accounts receivable;

h. "Hunt Club Insurance," which provided coverage for hunt clubs and the landowners to protect against injury and damage, provides host liquor coverage, and provided hired and non-owned auto coverage. In addition, an insured could select coverage for "personal and advertising," products/completed operations, and medical expenses up to $5,000 for any one person;

i. "NRA Business Alliance Insurance," which provided coverage for a firearms-related business, including coverage for loss or damage to any assets the insured business rents, leases or owns, coverage for general liability plus medical payments, coverage for claims of false advertising, gunsmith coverage, and optional coverage for business income, boiler and machinery, glass, computers, valuable papers and records, and accounts receivable;

j. "Gun Show Insurance," which provided coverage for the insured's liability arising out of the insured's occupation as a gun show promoter; and

k. "Home-Based Federal Firearms License Insurance" for gun dealers and gunsmiths, which

> provided coverage for the insured's business location, equipment and tools, and gear entrusted to the insured by the insured's clients, against theft, damage and other loss, and provides general liability coverage, including products/completed liability to insure the insured's finished work against later claims.

Together, these Lockton Affinity-administered Lloyd's insurance programs (and for a brief period, Lockton Affinity-administered Alea London Ltd. ("Alea") insurance programs), are referred to herein as the "Other NRA Programs."

16. Pursuant to written agreements with Lloyd's and the NRA, Lockton Affinity served as the administrator for the Other NRA Programs, carrying out such functions as marketing the insurance, binding the insurance, collecting and distributing premiums, and delivering policies to insureds.

17. Pursuant to written agreements with Lockton Affinity, Lloyd's and Alea served as the underwriters for the Other NRA Programs, providing insurance policies to individuals who purchased NRA-sponsored insurance. Lockton Affinity also placed these insurance policies through New York's excess line market.

Lockton Affinity's NRA Programs Violated New York Laws and Regulations

18. In violation of the Insurance Law, the Carry Guard Program, as brokered, administered, solicited and marketed by Lockton Affinity, provided insurance

coverage that may not be offered in the New York State excess line market, specifically: (a) defense coverage in a criminal proceeding that is not permitted by law; (b) liability coverage for bodily injury or property damage expected or intended from the insured's standpoint in an insurance policy limited to use of firearms and that was beyond the use of reasonable force to protect persons or property; and (c) coverage for expenses incurred by the insured for psychological counseling support.

19. Similarly, the NRA Retired Law Enforcement Officer Self-Defense Insurance Program provided insurance coverage that may not be offered in the New York State excess line market, specifically: (a) defense coverage in a criminal proceeding that is not permitted by law; and (b) liability coverage for bodily injury or property damage expected or intended from the insured's standpoint in an insurance policy limited to use of firearms and that was beyond the use of reasonable force to protect persons or property.

20. Additionally, the Carry Guard insurance program, as administered by Lockton Affinity, failed to comply with Section 3420 of the Insurance Law, which sets forth minimum requirements for liability insurance policies.

21. Lockton Affinity also violated the Insurance Law by giving or offering to give: (a) the No Cost ArmsCare Firearms Insurance for free to NRA members in good standing; and (b) free NRA membership, which the insured could use him or herself, or transfer to a

family member, if a person purchased the Carry Guard insurance, when the free NRA membership was not specified in the insurance policy and exceeded $25 in market value.

22. Lockton has represented to the Department that, between approximately April and November 2017, 680 Carry Guard insurance policies were issued to New York residents. Lockton has further represented to the Department that no claims have been submitted under the New York Carry Guard insurance policies to date.

23. Lockton has also represented to the Department that, for the period January 2000 through March 25, 2018, 28,015 insurance policies were issued to New York residents under the Other NRA Programs.

24. Under written agreements between Lockton Affinity and the NRA, as of March 25, 2018, Lockton has represented that the NRA received royalties on the Carry Guard Program in the amount of about $21,198, an amount based on a percentage of the actual premiums collected by Lockton Affinity under the Carry. Guard Program from New York residents, in violation of the Insurance Law. Similarly, under written agreements between Lockton Affinity and the NRA, the NRA received additional royalties tinder the Other NRA Programs based on a percentage of premiums collected by Lockton Affinity from New York residents, similarly violating the Insurance Law.

25. Lockton has represented to the Department that revenue to the NRA from the Carry Guard Program and the Other NRA Programs in New York totaled approximately $1,872,737 for the period January 2000 through March 25, 2018. Under written agreements between Lockton Affinity and the NRA, the NRA also received profit-sharing disbursements from Lockton Affinity based on a schedule agreed to by the parties in conjunction with the Other NRA Programs.

26. Between January 2000 and March 25, 2018, Lockton has represented to the Department that Lockton Affinity collected premiums from the Carry Guard Program and the Other NRA Programs in New York amounting to approximately $12,056,627. Lockton has also represented that it collected approximately $785,460 in administrative fees from insureds under the Carry Guard Program and the Other NRA Programs in New York during this time period.

Lockton Affinity Submitted Inaccurate Affidavits Required By the Insurance Law Pertaining to Excess Lines Insurance Coverage

27. Lockton Affinity, through one or more of its sublicensees, submitted affidavits to the Excess Line Association of New York ("ELANY") required by Insurance Law § 2118 in connection with the Carry Guard Program and the Other NRA Programs. As set forth below, those affidavits contained inaccurate information concerning compliance with the Insurance Law and regulations promulgated thereunder.

28. As noted above, an authorized insurer is an insurance company that is licensed by the Department to write certain kinds of insurance in New York, as specified in Insurance Law § 1113(a). Authorized insurers are fully regulated by the Department in order to ensure solvency and adherence to consumer protection standards. An unauthorized insurer is an insurer not licensed by the Department to write insurance in New York, and may be an insurer that provides "excess line" insurance only under prescribed rules.

29. Under the Insurance Law, unless another exemption applies, an excess line broker like Lockton Affinity that seeks to procure excess line insurance must first approach three separate authorized insurers to determine if any one of those insurers will write coverage for the risk. If all three authorized insurers decline to provide the requested coverage, only then may the excess line broker place the insurance with an unauthorized insurer like Chubb. An excess line broker must seek three declinations for each insured; the broker may not rely upon declinations obtained with respect to other insureds.

30. In placing the Carry Guard Program and Other NRA Program insurance policies, Lockton Affinity only obtained declinations from three authorized insurers once annually for a single policy for each of these insurance programs, and then relied upon the single annual declination with respect to all other insureds who received policies under these programs. At least one Lockton Affinity sublicensee affirmed that, to the best of his knowledge and belief, every policy

procured by the sublicensee on behalf of Lockton Affinity was in full compliance with the Insurance Law and regulations promulgated thereunder, when, in truth and in fact, the sublicensee had not secured such declinations in compliance with the Insurance Law.

The Department's Investigation

31. Since October 2017, the Department has been conducting an investigation of the involvement of Chubb, Lloyd's, Lockton and the NRA in the Carry Guard Program, the Other NRA Programs, and other matters, including review of thousands of pages of documents obtained from Chubb, Lockton and the NRA, and review of other information obtained from investigative resources (the "DFS Investigation").

32. Lockton has represented to the Department that, following initiation of the DFS Investigation in October 2017, which included information requests sent to Lockton in October 2017, Lockton Affinity suspended the Carry Guard Program on or about November 17, 2017, no longer making Carry Guard policies available for New York residents to purchase.

33. **NOW THEREFORE,** to resolve this matter without further proceedings, pursuant to Articles 21, 23 and 34 of the Insurance Law, Lockton Affinity, Lockton Companies, and the Department hereby stipulate and agree as follows:

VIOLATIONS OF LAW AND REGULATIONS

34. Lockton Affinity compensated the NRA based on actual premium collected when the NRA was acting as an unlicensed insurance broker by selling and soliciting insurance in New York, in violation of Insurance Law § 2116.

35. Lockton Affinity acted for and aided an unauthorized Chubb insurer, Illinois Union, in connection with Illinois Union's issuing or delivering policies in New York State, or otherwise issuing policies covering New York State residents, which provided insurance coverage that may not be offered in the New York State excess line market, specifically: (a) defense coverage in a criminal proceeding that is not permitted by law; (b) liability coverage for bodily injury or property damage expected or intended from the insured's standpoint in an insurance policy limited to use of firearms and that was beyond the use of reasonable force to protect persons or property; and (c) coverage for expenses incurred by the insured for psychological counseling support, in violation of Insurance Law § 2117.

36. Lockton Affinity gave, or offered to give, a free one-year NRA membership if a person purchased the Carry Guard Program insurance policy, when the NRA membership benefit was not specified in the policy and exceeded $25 in market value, in violation of Insurance Law § 2324(a).

37. Lockton Affinity gave, or offered to give, the No Cost ArmsCare Firearms Insurance at no cost to

NRA members in good standing, in violation of Insurance Law § 2324(a).

38. Lockton Affinity advertised the financial condition of a Chubb insurer by referring to the insurer's AM Best rating, in violation of Insurance Law § 2122(a)(1).

39. Lockton Affinity called attention to an unauthorized Chubb insurer by advertising Chubb's participation in the Carry Guard Program on the Carry Guard website, in violation of New York Insurance Law § 2122(a)(2).

40. Lockton Affinity failed to properly secure declinations from authorized insurers for each insured, in violation of Insurance Law § 2118.

SETTLEMENT PROVISIONS

Civil Monetary Penalty

41. Lockton Affinity shall pay a civil monetary penalty to the Department pursuant to Articles 21, 23 and 34 of the Insurance Law in the amount of $7,000,000. Lockton Affinity shall pay the entire amount within ten days of executing this Consent Order. Lockton Affinity agrees that it will not claim, assert, or apply for a tax deduction or tax credit with regard to any U.S. federal, state, or local tax, directly or indirectly, for any portion of the civil monetary penalty paid pursuant to this Consent Order. Lockton further agrees that it will not claim, seek, or receive indemnification of the civil monetary penalty from any

other person or entity. This provision is not intended, and shall not be construed, to prohibit Lockton affiliates from funding inter-company transfers to Lockton Affinity.

Prohibition on NRA-Endorsed Insurance Programs

42. Lockton agrees not to participate in the Carry Guard Program, any similar programs, or any other NRA-endorsed programs with regard to New York State, including, without limitation, (a) by agreeing not to provide Carry Guard or other insurance policies specific to firearm usage that provides liability coverage for bodily injury or property damage from use of a firearm, whether they are written or issued in New York State or elsewhere; and (b) by agreeing not to provide liability coverage for bodily injury or property damage expected or intended from the insured's standpoint in general liability policies that is not limited to those occasions where bodily injury results from the use of reasonable force to protect persons or property, whether they are written or issued in New York State or elsewhere; provided, however, that Lockton Affinity may provide runoff administration for any in-force policies not cancelled pursuant to Paragraph 46. Furthermore, Lockton agrees not to issue or deliver any Carry Guard or similar insurance policies in New York State, regardless of the residence of the insured. For the avoidance of doubt, Lockton shall not be prohibited from procuring homeowners, renters or general liability insurance in New York State or for New York

residents that includes personal injury liability insurance or property damage liability insurance for loss, damage, or expense that results from the negligent use of a firearm.

43. Lockton agrees that it shall not enter into any agreement or program with the NRA to underwrite or participate in any affinity-type insurance program involving any line of insurance to be issued or delivered in New York State or to anyone known to Lockton to be a New York resident; provided, however, that Lockton may assist the NRA in procuring insurance for the NRA's own corporate operations.

44. Lockton confirms and represents to the Department that, between approximately April and November 2017, 680 Carry Guard insurance policies were issued to New York residents. Lockton confirms and hereby represents to the Department that no claims have been submitted under the New York Carry Guard insurance policies to date.

45. Lockton confirms and represents to the Department that:

a. for the period January 2000 through March 25, 2018, 28,015 insurance policies were issued to New York residents under the Other NRA Programs;

b. Under written agreements between Lockton Affinity and the NRA, as of March 25, 2018, the NRA received royalties from the Carry Guard Program in New York in the amount of approximately $21,198;

c. Total revenue to the NRA from the Carry Guard Program and the Other NRA Programs in New York totaled approximately $1,872,737 for the period January 2000 through March 25, 2018;

d. Lockton Affinity collected premiums from the Carry Guard Program and the Other NRA Programs in New York amounting to approximately $12,056,627 for the period January 2000 through March 25, 2018;

e. Lockton Affinity collected approximately $785,460 in administrative fees from insureds under the Carry Guard Program and the Other NRA Programs in New York during the period January 2000 through March 25, 2018.

46. Lockton agrees to fully cooperate with Chubb, Lloyd's and Alea (the "Underwriters") to effect any cancellation initiated by an Underwriter of Carry Guard insurance policies issued to New York residents, NRA Retired Law Enforcement Officer Self-Defense Insurance policies issued to New York residents, and any other NRA-related insurance policies issued to New York residents that provide coverage for intentional acts or legal services insurance that were procured by Lockton Affinity, such cancellation to be effective 90 days from the date of such notice. Lockton agrees to cooperate with the Underwriters in submitting any such draft notices to the Department for the Department's review and approval prior to the mailing or delivery of such notices by the Underwriters. Lockton Affinity also agrees to fully cooperate in refunding the insurance premiums for the cancelled policies.

Thereafter, Lockton Affinity shall promptly file a certification with the Department that sets forth its compliance with this Paragraph 46.

47. Lockton Affinity agrees not to procure from an unauthorized insurer any insurance policy to be issued or delivered in New York State, or to anyone known to Lockton Affinity to be a New York resident, in the New York State excess line market that provides: (a) defense coverage in a criminal proceeding; (b)(i) liability coverage for bodily injury or property damage expected or intended from the insured's standpoint in an insurance policy limited to use of firearms and that is beyond the use of reasonable force to protect persons or property, or (ii) liability coverage for bodily injury or property damage expected or intended from the insured's standpoint in general liability policies that is not limited to those occasions where bodily injury results from the use of reasonable force to protect persons or property; and (c) coverage for expenses incurred by the insured for psychological counseling support. For the avoidance of doubt, Lockton shall not be prohibited from procuring homeowners, renters or general liability insurance in New York State or for New York residents that includes personal injury liability insurance or property damage liability insurance for loss, damage, or expense that results from the negligent use of a firearm.

Full and Complete Cooperation of Lockton

48. Lockton commits and agrees to fully cooperate with the DFS Investigation and all terms of this Consent Order. Such cooperation shall include, without limitation:

a. producing all non-privileged documents and other materials to the Department, as requested, wherever located in Lockton's possession, custody, or control;

b. requiring employees or agents to appear for interviews, at such reasonable times and places, as requested by the Department;

c. responding fully and truthfully in a prompt manner to all inquiries when requested to do so by the Department; and

d. testifying at hearings, trials and other judicial, administrative or other proceedings, when requested to do so by the Department, in connection with its investigation of matters relating to any NRA-endorsed insurance program.

Compliance Review

49. Lockton agrees to fully and completely cooperate with the DFS Investigation by providing a truthful, accurate and complete report to the Department, within 60 days of the execution of this Consent Order the "Compliance Review"), that reports on:

a. any additional violations of the Insurance Law, or regulations promulgated thereunder, that Lock-ton has identified;

b. any actions undertaken by Lockton to identify any violations of the Insurance Law, or the regulations promulgated thereunder; and

c. a plan for remediation of any violation of the Insurance Law, or regulations promulgated thereunder, identified in connection with the Carry Guard Program, the Other NRA Programs, or any other insurance program or conduct that violates the Insurance Law, or regulations promulgated thereunder.

The Department may, in its sole regulatory discretion, accept, reject, or modify any plan of remediation submitted by Lockton.

Breach of Consent Order

50. If the Department believes Lockton or Lockton Affinity to be in material breach of this Consent Order, the Department will provide written notice to Lockton and/or Lockton Affinity and Lockton and/or Lockton Affinity (as the case may be) must, within ten business days of receiving such notice, or on a later date if so determined in the Department's sole discretion, appear before the Department to demonstrate that no material breach has occurred or, to the extent pertinent, that the breach is not material or has been cured.

51. The Parties understand and agree that Lockton's and/or Lockton Affinity's failure to make the required showing within the designated time period shall be presumptive evidence of such party's breach. Upon a finding that Lockton and/or Lockton Affinity has breached this Consent Order, the Department has all the remedies available to it under the New York Insurance and Financial Services Laws and may use any evidence available to the Department in any ensuing hearings, notices, or orders.

Waiver of Rights

52. The Parties understand and agree that no provision of this Consent Order is subject to review in any court or tribunal outside the Department.

Parties Bound by the Consent Order

53. This Consent Order is binding on the Parties, as well as any successors and assigns. This Consent Order does not bind any federal or other state agency or any law enforcement authority.

54. No further action will be taken by the Department against Lockton in connection with the Carry Guard Program and the Other NRA Programs for the period January 1, 2000 through March 31, 2018, provided that Lockton complies fully with the terms of this Consent Order, including Paragraphs 48 and 49 above.

55. Notwithstanding any other provision contained in this Consent Order, the Department may undertake action against Lockton for transactions or conduct that Lockton did not disclose to the Department in the written materials that Lockton submitted to the Department in connection with this matter, including, without limitation, any transactions or conduct that Lockton identifies to the Department pursuant to the Compliance Review that it will undertake as set forth in Paragraph 49 of this Consent Order.

Notices

56. All notices or communications regarding this Consent Order shall be sent to: For the Department:

For the Department:

Hadas Jacobi
Assistant Deputy Superintendent
for Enforcement
New York State Department of Financial Services
One State Street
New York, NY 10004

Megan Prendergast
Deputy Superintendent for Enforcement
New York State Department of Financial Services
One State Street
New York, NY 10004

Connor Mealey
Excelsior Fellow
New York State Department of Financial Services
One State Street
New York, NY 10004

For Lockton Companies, LLC:

William Humphrey
Secretary
Lockton Companies
444 West 47th Street
Kansas City, MO 64112

Scott A. Edelman
Milbank, Tweed, Hadley & McCloy
28 Liberty Street
New York, NY 10005

Andrew R. Holland
Sidley Austin
787 Seventh Avenue
New York, NY 10019

For Lockton Affinity, LLC:

William Humphrey
Secretary
Lockton Affinity
444 West 47th Street
Kansas City, MO 64112

Scott A. Edelman
Milbank, Tweed, Hadley & McCloy
28 Liberty Street
New York, NY 10005

Andrew R. Holland
Sidley Austin
787 Seventh Avenue
New York, NY 10019

Miscellaneous

57. Each provision of this Consent Order shall remain effective and enforceable until stayed, modified, suspended, or terminated by the Department.

58. No promise, assurance, representation, or understanding other than those contained in this Consent Order has been made to induce any party to agree to the provisions of the Consent Order.

IN WITNESS WHEREOF, the parties have caused this Consent Order to be signed this 2nd day of May, 2018.

LOCKTON COMPANIES LLC,
on behalf of each of its separate
operating series.

By: /s/ William Humphrey
WILLIAM HUMPHREY
Secretary

LOCKTON AFFINITY, LLC,
on behalf of each of its separate
operating series.

By: /s/ William Humphrey
WILLIAM HUMPHREY
Secretary

NEW YORK STATE DEPARTMENT
OF FINANCIAL SERVICES

By: /s/ Maria T. Vullo
MARIA T. VULLO
Superintendent of Financial Services

By: /s/ Matthew L. Levine
MATTHEW T. LEVINE
Executive Deputy Superintendent for
Enforcement

NEW YORK STATE DEPARTMENT
OF FINANCIAL SERVICES

In the Matter of

CHUBB GROUP HOLDINGS INC.
and ILLINOIS UNION
INSURANCE COMPANY.

CONSENT ORDER UNDER SECTIONS 1102 AND 3420 OF THE INSURANCE LAW

(Filed May 7, 2018)

Chubb Group Holdings Inc., its subsidiary, Illinois Union Insurance Company ("Illinois Union") (together, "Chubb") and the New York Department of Financial Services (the "Department") are willing to resolve the matters described herein without further proceedings.

THE DEPARTMENT'S FINDINGS FOLLOWING INVESTIGATION

1. Chubb is the world's largest publicly-traded property and casualty insurance company, and the largest commercial insurer in the United States. Chubb has operations in 54 countries and territories, providing commercial and personal property and casualty insurance, personal accident and supplemental health insurance, reinsurance and life insurance to customers. Several Chubb subsidiaries have been licensed by the Department to conduct certain types of insurance business in the State of New York since at least 1922. Illinois Union, a Chubb subsidiary, is an

unauthorized insurer that is eligible to write excess line insurance in New York State.

2. In connection with the "Carry Guard" insurance program discussed herein, Illinois Union held itself out to the public simply as "Chubb."

3. Lockton Companies, LLC ("Lockton") is the world's largest privately owned, independent insurance brokerage firm, offering customers risk management, insurance and employee benefits services. At least one of its affiliates has been licensed by the Department since approximately 1987. Lockton Affinity, LLC ("Lockton Affinity") is an affiliate of Lockton Companies, and has been licensed by the Department to act as an excess line insurance broker since at least 2013.

4. The National Rifle Association of America ("NRA") is a New York not-for-profit corporation incorporated in 1871. The NRA describes its mission as "firearms safety, education, and training and advocacy on behalf of safe and responsible gun owners." The NRA is not licensed by the Department.

5. From approximately April through November 2017, the NRA offered an insurance program to new and existing members resident in New York called "Carry Guard." According to the NRA's website:

> ***NRA Carry Guard is a two pronged program. It was created to provide dynamic, state-of-the-art insurance protection to those who legally defend themselves with a firearm, and to offer an elite, one-stop training option. The insurance provides***

> ***a cutting edge set of features that will help gun owners mitigate the potentially costly financial and legal consequences flowing from armed encounters, even if they did everything right.***

The NRA website further described the Carry Guard program as "the only membership carry program ***developed and supported by the National Rifle Association***, the most powerful civil rights organization in American history." The website further stated that Carry Guard was "***created by the NRA***."

6. Additional promotional materials disseminated by the NRA stated:

> **Why do I need Carry Guard?** Although millions of Americans are prepared to use a firearm in self-defense, very few families can withstand the financial consequences that may come next. The legal fees to clear your good name could be enormous. Likewise, the costs of defending and potentially losing a civil lawsuit could cripple your finances for the rest of your life. ***And many homeowners' policies have severe limitations or exclusions related to intentional acts such as self-defense.***

These materials stated at the bottom of the page: "NRA CARRY GUARD™ Insurance Program Administered by Lockton Affinity, LLC • D/B/A/ Lockton Affinity Insurance Brokers, LLC."

7. Pursuant to written agreements with Lockton, Chubb – through Illinois Union – served as the

underwriter for the Carry Guard insurance program, providing insurance policies to individuals who purchased Carry Guard insurance. Lockton Affinity placed these insurance policies through New York's excess line insurance market.

8. Pursuant to written agreements between Chubb/Illinois Union and Lockton Affinity, and between Lockton Affinity and the NRA, Lockton Affinity served as the administrator for the insurance program, carrying out such functions as marketing the insurance, binding the insurance, collecting and distributing premiums, and delivering policies to insureds.

9. Without a license by the Department, the NRA engaged in aggressive marketing of and solicitation for the Carry Guard insurance program. For example (and without limitation):

- The NRA broadcasted NRA-produced videos promoting the Carry Guard insurance program on YouTube;

- The NRA solicited participation in the Carry Guard insurance program through mass e-mail marketing, direct mail, banner ads, and articles in NRA publications;

- The NRA heavily promoted the Carry Guard insurance program at its 2017 "Carry Guard Expo" and its annual meetings;

- The NRA operated the website "www.nracarryguard.com," which was an important marketing portal for the Carry Guard insurance program and linked to

a website operated by Lockton Affinity (www.lockton nracarryguard.com), which provided additional information about the Carry Guard insurance program;

- The NRA promoted Carry Guard insurance on its main website, www.nra.org, which, among other things, featured an NRA spokesperson making claims such as, "***We're proud to have developed*** the one carry membership program that stands above all others – NRA Carry Guard"; and "I will never carry a gun without carrying this."; and

- "Pop-up" internet advertising for the Carry Guard insurance program that featured one or more NRA spokespersons.

10. The Carry Guard insurance program, as underwritten by Chubb/Illinois Union and administered, solicited and marketed by Lockton Affinity, unlawfully provided insurance coverage that may not be offered in the New York State excess line market, specifically: (a) defense coverage in a criminal proceeding that is not permitted by law; (b) liability coverage for bodily injury or property damage expected or intended from the insured's standpoint in an insurance policy limited to use of firearms and that was beyond the use of reasonable force to protect persons or property; and (c) coverage for expenses incurred by the insured for psychological counseling support.

11. The Carry Guard insurance program, as underwritten by Chubb/Illinois Union and administered by Lockton Affinity, failed to comply with Section 3420 of the Insurance Law, which sets forth minimum requirements for liability insurance policies.

12. Moreover, in underwriting and administering the Carry Guard insurance program at the behest of the NRA, with knowledge that the NRA did not have a license to conduct insurance business from the Department, Chubb/Illinois Union and Lockton Affinity engaged in practices with an unlicensed party, the NRA, in a manner that resulted in violations of the Insurance Law.

13. Chubb/Illinois Union has represented to the Department that, between approximately April and November 2017, 681 Carry Guard insurance policies were issued to New York residents; and has represented to the Department that no claims have been submitted under the Carry Guard insurance policies to date by New York residents.

14. Under the written agreements between Lockton Affinity and the NRA, the NRA was entitled to and did receive a variety of compensation in connection with the Carry Guard insurance program, even though it had no license from the Department, including as follows:

- The NRA was entitled to be paid half of the "administrative fee" collected by Lockton Affinity from Carry Guard insureds for purported but unspecified services;

- The NRA was entitled to receive certain royalties from Lockton Affinity for use of the NRA's name in conjunction with the Carry Guard insurance program; and

- The NRA was entitled to receive 100 percent of certain "profit sharing" awards arising out any funds generated and paid from a certain Lloyd's insurance policy.

15. Since October 2017, the Department has been conducting an investigation of the involvement of Chubb, Lockton and the NRA in the Carry Guard insurance program and other matters, including a review of thousands of pages of documents obtained from Chubb, Lockton and the NRA, as well as other information obtained from investigative resources (the "DFS Investigation").

16. Following initiation of the DFS Investigation in October 2017, which included document and information requests sent to Chubb in October 2017, Chubb and Illinois Union suspended participation in the Carry Guard program on or about November 17, 2017, and ceased making available Carry Guard policies for New York residents to purchase.

17. **NOW THEREFORE**, to resolve this matter without further proceedings, pursuant to Sections 1102 and 3420 of the Insurance Law, Chubb, Illinois Union, and the Department (collectively, the "Parties") hereby stipulate and agree as follows:

VIOLATIONS OF LAW AND REGULATIONS

18. Chubb, through Illinois Union, engaged in the business of insurance without a license by issuing or delivering policies in New York State, or otherwise

issuing policies covering New York State residents, which provided insurance coverage that may not be offered in the New York State excess line market, specifically: (a) defense coverage in a criminal proceeding that is not permitted by law; (b) liability coverage for bodily injury or property damage expected or intended from the insured's standpoint in an insurance policy limited to use of firearms and that was beyond the use of reasonable force to protect persons or property; and (c) coverage for expenses incurred by the insured for psychological counseling support, in violation of Insurance Law § 1102.

19. Chubb, through Illinois Union, issued liability insurance coverage to New York residents that failed to contain required liability insurance policy provisions, in violation of Insurance Law § 3420.

SETTLEMENT PROVISIONS

Civil Monetary Penalty

20. Chubb shall pay a civil monetary penalty to the Department pursuant to Sections 1102 and 3420 of the Insurance Law in the amount of $1,300,000. Chubb shall pay the entire amount within ten days of executing this Consent Order. Chubb agrees that it will not claim, assert, or apply for a tax deduction or tax credit with regard to any U.S. federal, state, or local tax, directly or indirectly, for any portion of the civil monetary penalty paid pursuant to this Consent Order. Chubb further agrees that it will not claim, seek, or

receive indemnification of the civil monetary penalty from any other person or entity.

Prohibition on Carry Guard and Other Insurance Programs

21. Chubb and Illinois Union agree not to participate in the Carry Guard insurance program or any similar program with regard to New York State, including, without limitation, by agreeing not to provide Carry Guard or other insurance policies specific to firearm usage that provide liability coverage for bodily injury or property damage from use of a firearm; and by agreeing not to provide liability coverage for bodily injury or property damage expected or intended from the insured's standpoint in general liability policies that is not limited to those occasions where bodily injury results from the use of reasonable force to protect persons or property, whether they are written or issued in New York State or elsewhere. Furthermore, Chubb and Illinois Union agree not to issue or deliver any Carry Guard or similar insurance policies in New York State, regardless of the residence of the insured. For the avoidance of doubt, Chubb and Illinois Union shall not be prohibited from providing homeowners, renters or general liability insurance in New York State or for New York residents that includes personal injury liability insurance or property damage liability insurance for loss, damage, or expense that results from the negligent use of a firearm.

22. Chubb and Illinois Union agree that they shall not enter into any agreement or program with the NRA to underwrite or participate in any affinity-type insurance program involving any line of insurance; provided, however, that the NRA may itself purchase insurance from Chubb for the sole purpose of obtaining insurance for the NRA's own corporate operations. Chubb and Illinois Union further agree that they shall not enter into any affinity-type insurance program without undertaking reasonable due diligence to ensure that any entity involved in the issuance, brokering, administration or marketing of such affinity insurance program is acting in compliance with the Insurance Law and the regulations promulgated thereunder, including but not limited to, any licensure requirements of the Insurance Law or regulations promulgated thereunder.

23. Chubb/Illinois Union has represented to the Department that, between approximately April and November 2017, 681 Carry Guard insurance policies were issued to New York residents; and has represented to the Department that no claims have been submitted under the Carry Guard insurance policies to date by New York residents.

24. Within 10 business days of the execution of this Consent Order, Illinois Union shall mail or deliver to all New York State insureds notice stating that Illinois Union is canceling the insured's Carry Guard insurance policy effective 90 days from the date of notice. Illinois Union agrees to submit the draft notices to the Department for the Department's review and approval

prior to Illinois Union mailing or delivering such notices. Illinois Union also agrees to fully refund the insurance premiums for the cancelled policies. Thereafter, Illinois Union shall promptly file a certification with the Department that sets forth its compliance with this Paragraph 24.

25. Chubb and Illinois Union agree not to issue or deliver in New York State an insurance policy, or otherwise issue an insurance policy covering a New York State resident, that provides defense coverage in a criminal proceeding unless expressly permitted by law.

26. Illinois Union and any other unauthorized Chubb insurer agree not to issue or deliver in New York State an insurance policy, or otherwise issue an insurance policy covering a New York State resident, that provides insurance for expenses incurred for psychological counseling support because such conduct violates the Insurance Law.

Full and Complete Cooperation of Chubb

27. Chubb and Illinois Union commit and agree to fully cooperate with the DFS Investigation and all terms of this Consent Order. Such cooperation shall include, without limitation:

a. producing all non-privileged documents and other materials to the Department, as requested, wherever located in the possession, custody, or control of Chubb or Illinois Union;

b. requiring employees or agents to appear for interviews, at such reasonable times and places, as requested by the Department;

c. responding fully and truthfully in a prompt manner to all inquiries when requested to do so by the Department; and

d. testifying at hearings, trials and other judicial, administrative or other proceedings, when requested to do so by the Department, in connection with its investigation of matters relating to the Carry Guard insurance program.

Breach of Consent Order

28. If the Department believes Chubb or Illinois Union to be in material breach of this Consent Order, the Department will provide written notice to Chubb or Illinois Union and Chubb or Illinois Union must, within ten business days of receiving such notice, or on a later date if so determined in the Department's sole discretion, appear before the Department to demonstrate that no material breach has occurred or, to the extent pertinent, that the breach is not material or has been cured.

29. The parties understand and agree that the failure of Chubb or Illinois Union to make the required showing within the designated time period shall be presumptive evidence of Chubb's or Illinois Union's breach. Upon a finding that Chubb or Illinois Union has breached this Consent Order, the Department has

all the remedies available to it under New York Insurance and Financial Services Law and may use any evidence available to the Department in any ensuing hearings, notices, or orders.

Waiver of Rights

30. The parties understand and agree that no provision of this Consent Order is subject to review in any court or tribunal outside the Department.

Parties Bound by the Consent Order

31. This Consent Order is binding on the Department, Chubb and Illinois Union, as well as any successors and assigns. This Consent Order does not bind any federal or other state agency or any law enforcement authority.

32. No further action will be taken by the Department against Chubb for the specific conduct set forth in this Consent Order, provided that Chubb complies fully with the terms of this Consent Order, including paragraph 27 above.

33. Notwithstanding any other provision contained in this Consent Order, the Department may undertake action against Chubb or Illinois Union for transactions or conduct that Chubb or Illinois Union did not disclose to the Department in the written materials that Chubb and Illinois Union submitted to the Department in connection with this matter.

Notices

34. All notices or communications regarding this Consent Order shall be sent to: For the Department:

For the Department:

Hadas Jacobi
Assistant Deputy Superintendent
for Enforcement
New York State Department of Financial Services
One State Street
New York, NY 10004

Megan Prendergast
Deputy Superintendent for Enforcement
New York State Department of Financial Services
One State Street
New York, NY 10004

Connor Mealey
Excelsior Fellow
New York State Department of Financial Services
One State Street
New York, NY 10004

For Chubb:

Kevin Rampe
General Counsel
Chubb Group
1133 Avenue of the Americas
New York, NY 10036

John P. Mulhern
Drinker, Biddle & Reath LLP
1177 Avenue of the Americas
New York, NY 10036

For Illinois Union:

Kevin Rampe
General Counsel
Chubb Group
1133 Avenue of the Americas
New York, NY 10036

John P. Mulhern
Drinker, Biddle & Reath LLP
1177 Avenue of the Americas
New York, NY 10036

Miscellaneous

35. Each provision of this Consent Order shall remain effective and enforceable until stayed, modified, suspended, or terminated by the Department.

36. No promise, assurance, representation, or understanding other than those contained in this Consent Order has been made to induce any party to agree to the provisions of the Consent Order.

IN WITNESS WHEREOF, the parties have caused this Consent Order to be signed this 7th day of May, 2018.

CHUBB GROUP HOLDINGS INC.

By: /s/ Joseph Wayland
JOSEPH WAYLAND
Executive Vice President and
General Counsel

ILLINOIS UNION INSURANCE COMPANY

By: /s/ Joseph Wayland
JOSEPH WAYLAND

NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES

By: /s/ Maria T. Vullo
MARIA T. VULLO
Superintendent of Financial Services

By: /s/ Matthew L. Levine
MATTHEW T. LEVINE
Executive Deputy Superintendent for Enforcement

NEW YORK STATE DEPARTMENT
OF FINANCIAL SERVICES

In the Matter of

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO INSURANCE POLICIES ISSUED TO THE NATIONAL RIFLE ASSOCIATION OF AMERICA

CONSENT ORDER UNDER SECTIONS 1102 AND 3420 OF THE INSURANCE LAW

(Filed Dec. 20, 2018)

The following underwriters at the Lloyd's London market, which are subject to this Consent Order, acting through the undersigned managing agents: KLN 0510, managing agent Tokio Marine Kiln Syndicates Limited; AUW 0609, managing agent Atrium Underwriters Limited; SAM 0727, managing agent S.A. Meacock & Company Limited; CNP 0958, managing agent Canopius Managing Agents Limited; CSL 1084, managing agent Chaucer Syndicates Limited; ROC 1200, managing agent Argo Managing Agency Limited; GER 1206, managing agent AmTrust Syndicates Limited; BRT 2987, managing agent Brit Syndicates Limited; CNP 4444, managing agent Canopius Managing Agents Limited; and LIB 4472, managing agent Liberty Managing Agency Limited (together, the "Underwriters"), and the New York State Department of Financial Services (the "Department") are willing to resolve the matters described herein without further proceedings.

This Order is entered into by the undersigned managing agents, who execute this Order on behalf of Underwriters.

THE DEPARTMENT'S FINDINGS FOLLOWING INVESTIGATION

1. Lloyd's of London is an insurance market encompassing underwriting syndicates managed by more than 50 managing agents with whom over 200 registered brokers do business, some of which involves a global network of over 4,000 local agents, known as "coverholders," which have underwriting authority on behalf of the underwriting syndicates.[1] The Lloyd's market is overseen by the U.K.-based Corporation of Lloyd's.

2. An "admitted" insurer is an insurance company that has received a license from the Department to provide specified types of insurance to customers in New York. Admitted insurers are fully regulated by the Department in order to ensure solvency and adherence to consumer protection standards. A non-admitted insurer is an insurer not licensed by the Department, and may be an insurance carrier that provides "excess line" insurance only under prescribed rules.

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[1] A "coverholder" in the Lloyd's market is an insurance intermediary authorized by a managing agent to enter into contracts of insurance to be underwritten by the members of a syndicate managed by it, in accordance with the terms of a binding authority. *See* https://wwwiloyds.comilloyds-around-the-world/europe/switzerland/becoming-an-intermediary-and-coverholder.

3. Excess line coverage offers policyholders an opportunity to obtain insurance that could not be procured through admitted insurance carriers. Excess line carriers are not licensed by the Department but are permitted to do business in New York through a licensed excess line broker. Generally, an excess line policy can be written only after it has been declined by at least three admitted carriers.

4. Lockton Companies, LLC ("Lockton") is the world's largest privately owned, independent insurance brokerage firm, offering customers risk management, insurance and employee benefits services. At least one of its affiliates has been licensed by the Department since approximately 1987. Lockton Affinity, LLC ("Lockton Affinity") is an affiliate of Lockton Companies, and has been licensed by the Department to act as an excess line insurance broker since at least 2013.

5. The National Rifle Association of America ("NRA") is a New York not-for-profit corporation incorporated in 1871. The NRA describes its mission as "firearms safety, education, and training and advocacy on behalf of safe and responsible gun owners." The NRA is not and has never been licensed by the Department.

6. From approximately January 2000 through March 2018 (or, for certain insuring agreements, for shorter time periods within this span), the NRA (through Lockton Affinity) offered 15 insurance programs to new and existing NRA members in New York and elsewhere

that were underwritten by Underwriters, including, *inter alia*:

a. "Self-Defense Insurance," which provided coverage for criminal and civil defense costs, and bodily injury and damage caused by the use of a firearm;

b. "Retired Law Enforcement Officer Self-Defense Insurance," which provided coverage for criminal and civil defense costs, and bodily injury and damage caused by the use of a firearm;

c. "Second-Call Defense Insurance," which provided coverage for criminal and civil defense costs, and bodily injury and damage caused by the use of a firearm;

d. "ArmsCare Plus Firearms Insurance," which provided coverage for legal firearms and attached accessories against loss, damage, flood, fire, and theft (including theft from a locked vehicle);

e. "No Cost ArmsCare Firearms Insurance," which provided free coverage to NRA members in good standing for legal firearms and their attached accessories, up to $2,500 in value, against loss, damage, flood, fire, and theft (including theft from a locked vehicle);

f. "Firearms Instructor Plus Liability Insurance," which provided coverage for injuries or damage the insured causes while acting as an instructor during a lesson, medical expenses up to $5,000, legal expenses from lawsuits

related to the injuries or damage, and professional liability coverage that protects the member from allegations of negligent training;

g. "Personal Firearms Protection Insurance," which provided coverage for any unintentional injuries or damage an insured causes while hunting or trapping on public or private land, shooting in competitions, or shooting at private shooting ranges, with a firearm, air gun, bow and arrow, or trapping equipment, and coverage for lawsuit defense costs;

h. "Gun Collector Insurance," which provided coverage for certain firearms and their attached accessories against loss, damage, fire, and theft (including theft from a locked vehicle);

i. "Gun Club Insurance," which provided coverage for loss or damage to any assets the gun club rents, leases or owns, coverage for general liability plus medical payments, coverage for claims of false advertising, and optional coverage for business income, boiler and machinery, glass, computers, valuable papers and records, and accounts receivable;

j. "Hunt Club Insurance," which provided coverage for hunt clubs and the landowners to protect against injury and damage, provided host liquor coverage, and provides hired and non-owned auto coverage. In addition, an insured may select coverage for "personal and advertising", products/completed operations, and

medical expenses up to $5,000 for any one person;

k. "NRA Business Alliance Insurance," which provided coverage for a firearms-related business, including coverage for loss or damage to any assets the insured business rents, leases or owns, coverage for general liability plus medical payments, coverage for claims of false advertising, gunsmith coverage, and optional coverage for business income, boiler and machinery, glass, computers, valuable papers and records, and accounts receivable;

l. "Gun Show Insurance," which provided coverage for the insured's liability arising out of the insured's occupation as a gun show promoter; and

m. "Home-Based Federal Firearms License Insurance" for gun dealers and gunsmiths, which provided coverage for the insured's business location, equipment and tools, and gear entrusted to the insured by the insured's clients, against theft, damage and other loss, and provided general liability coverage, including products/completed liability to insure the insured's finished work against later claims.

Together, these insurance programs are referred to herein as the "NRA Programs."[2]

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[2] This paragraph includes summary descriptions obtained from the NRA website of coverage provided under the pertinent insurance agreements. The specific operative terms and conditions of these coverages are set forth in the actual insuring agreements identified.

7. Pursuant to written agreements with Lockton, Underwriters served as the underwriters for the NRA Programs, providing insurance policies to individuals and organizations who purchased NRA-sponsored insurance. Lockton Affinity placed coverage for individuals whose home state is New York with Underwriters as part of a group policy issued to the NRA in Virginia. Lockton also procured from Underwriters individual policies covering organizations, such as gun clubs, whose home state is New York.

8. Pursuant to written agreements between Underwriters and Lockton Affinity, and between Lockton Affinity and the NRA, Lockton Affinity served as the administrator for the NRA Programs, carrying out such functions as marketing the insurance, binding the insurance, collecting and distributing premiums, and delivering policy documents to insureds.

9. The NRA Programs, as underwritten by Underwriters and administered by Lockton Affinity, unlawfully provided insurance coverage that may not be offered in the New York State excess line market, specifically: (a) defense coverage in a criminal proceeding that is not permitted by law; and (b) liability coverage for bodily injury or property damage expected or intended from the insured's standpoint in an insurance policy limited to use of firearms and that was beyond the use of reasonable force to protect persons or property.

10. The NRA Programs, as underwritten by Underwriters and administered by Lockton Affinity,

further failed to comply with Section 3420 of the Insurance Law, which sets forth minimum requirements for liability insurance policies.

11. Moreover, Underwriters issued to the NRA impermissible group policies covering insureds whose home state is New York State, as neither Insurance Law Article 34 nor Insurance Regulation 135 (11 N.Y.C.R.R. § 153) authorize Underwriters to write this type of group property or casualty insurance.

12. Underwriters have represented to the Department that, between approximately January 2000 and May 31, 2018, (a) 24,637 insurance policies or insuring agreements were issued to persons or entities with a New York address in connection with the NRA Programs; and (b) 401 claims for payment have been filed by persons or entities whose home state is New York for the NRA Programs as of December 18, 2018.

13. Since October 2017, the Department has been conducting an investigation of the involvement of the Corporation of Lloyd's, Underwriters, Lockton and the NRA in the NRA Programs and other matters, including a review of thousands of pages of documents obtained from the Corporation of Lloyd's, Underwriters, Lockton Affinity and the NRA, as well as other information obtained from relevant sources (the "DFS Investigation").

14. Underwriters have represented to the Department that, following initiation of the DFS Investigation, Underwriters suspended their participation in

the NRA Programs as of June 1, 2018 with respect to persons or entities whose home state is New York.

15. **NOW THEREFORE**, to resolve this matter without further proceedings, pursuant to Sections 1102 and 3420 of the Insurance Law, Underwriters and the Department (collectively, the "Parties") hereby stipulate and agree as follows:

VIOLATIONS OF LAW AND REGULATIONS

16. Underwriters engaged in the business of insurance without a license by issuing or delivering policies in New York, or otherwise issuing policies covering insureds whose home state is New York State, which provided insurance coverage that may not be offered in the New York State excess line market, specifically: (a) defense coverage in a criminal proceeding that is not permitted by law; and (b) liability coverage for bodily injury or property damage expected or intended from the insured's standpoint in an insurance policy limited to use of firearms and that was beyond the use of reasonable force to protect persons or property, in violation of Insurance Law § 1102.

17. Underwriters issued liability insurance coverage to insureds whose home state is New York that failed to contain required liability insurance policy provisions, in violation of Insurance Law § 3420.

SETTLEMENT PROVISIONS

Civil Monetary Penalty

18. Underwriters shall pay a civil monetary penalty to the Department pursuant to Sections 1102 and 3420 of the Insurance Law in the amount of $5,000,000. Underwriters shall pay the entire amount within ten days of executing this Consent Order. Underwriters agree that they will not claim, assert, or apply for a tax deduction or tax credit with regard to any U.S. federal, state, or local tax, directly or indirectly, for any portion of the civil monetary penalty paid pursuant to this Consent Order. Underwriters further agree that they will not claim, seek, or receive indemnification of the civil monetary penalty from any other person or entity.

Prohibition on Certain Insurance Programs

19. Underwriters agree not to issue or deliver in New York State any insurance policies specific to firearm usage that provide liability coverage for bodily injury or property damage from use of a firearm, including, but not limited to, (a) the NRA "Self-Defense Insurance" policy, (b) the NRA "Retired Law Enforcement Officer Self-Defense Insurance" policy and (c) the NRA "Second-Call Defense Insurance" policy; and agree not to provide, to persons or entities whose home state is New York, liability coverage for bodily injury or property damage expected or intended from the insured's standpoint in general liability coverage that is not limited to those occasions where bodily injury results from

the use of reasonable force to protect persons or property, whether they are written or issued in New York State or elsewhere including, but not limited to, (a) the NRA "Self-Defense Insurance" policy, (b) the NRA "Retired Law Enforcement Officer Self-Defense Insurance" policy and (c) the NRA "Second-Call Defense Insurance" policy. For the avoidance of doubt, Underwriters shall not be prohibited from providing homeowners, renters or general liability insurance in New York State, or for New York persons or entities whose home state is New York, that includes bodily injury liability insurance or property damage liability insurance for loss, damage, or expense that results from the negligent use of a firearm.

20. Underwriters agree that they shall not enter into any agreement or program with the NRA to underwrite or participate in any affinity-type insurance program involving any line of insurance covering persons or entities whose home state is New York; provided, however, that the NRA may itself purchase insurance from Underwriters for the sole purpose of obtaining insurance for the NRA's own corporate operations. Underwriters further agree that they shall not enter into any affinity-type insurance program, involving any line of insurance covering persons or entities whose home state is New York, without undertaking reasonable due diligence to ensure that any person or entity involved in the issuance, brokering, administration or marketing of such affinity insurance program is acting in compliance with the Insurance Law and the regulations promulgated thereunder, including but

not limited to, any licensure requirements of the Insurance Law or regulations promulgated thereunder.

21. Underwriters agree not to issue or deliver in New York State any group insurance policy, or issue any group insurance policy covering an insured whose home state is New York State, unless the Insurance Law or regulations promulgated thereunder authorize the Underwriters to write the group insurance policy in the New York State excess line market.

22. Within 10 business days of the full execution of this Order, Underwriters shall cause Lockton Affinity to mail or deliver, within 30 days of the full execution of this Order, to all insureds whose home state is New York under the NRA "Self-Defense Insurance," NRA "Retired Law Enforcement Officer Self-Defense Insurance," and NRA "Second-Call Defense Insurance" programs a notice stating that Underwriters are canceling the insurance coverage provided under these specific NRA Programs effective 90 days from the date of notice. Underwriters agree to cause Lockton to submit the draft notices to the Department for the Department's review and approval prior to the mailing or delivering such notices. Underwriters further agree to fully refund the insurance premiums for the specific coverages canceled under these NRA Programs. Thereafter, Underwriters shall promptly file a certification with the Department that sets forth their compliance with this Paragraph 22.

23. Also within 10 business days of the full execution of this Order, Underwriters shall cause Lockton

Affinity (a) to mail or deliver, within 30 days of the full execution of this Order, to the NRA a notice stating that Underwriters are cancelling the insurance coverage provided under the NRA "No Cost ArmsCare Firearms Insurance Policy" to all insureds whose home state is New York effective 90 days from the date of notice and (b) to direct the NRA to notify such insureds (by the prescribed notice methods set forth in the "No Cost ArmsCare Firearms Insurance Policy") that this coverage has been cancelled. Underwriters agree to cause Lockton Affinity to submit the draft notice(s) required by Paragraph 23(a) to the Department for the Department's review and approval prior to the mailing or delivering of such notices. If the NRA does not provide, by the prescribed notice methods set forth in the "No Cost ArmsCare Firearms Insurance Policy," notice to all insureds whose home state is New York that the "No Cost ArmsCare Firearms Insurance Policy" coverage has been cancelled within the specified (or, if not specified, reasonable) time period, then at the Department's direction, Underwriters shall take and/or cause Lockton Affinity to take, such further action as reasonably may be required to notify the insureds of the cancellation including, without limitation, publication of notice of cancellation in relevant newspapers, periodicals or other media, subject to the Department's prior approval. Thereafter, Underwriters shall promptly file a certification with the Department that sets forth their compliance with this Paragraph 23.

24. Underwriters shall direct Lockton Affinity to non-renew any of the NRA Programs, other than the

NRA Programs specified in Paragraphs 22 and 23 of this Order, issued under the group policy to an insured whose home state is New York, at the end of the coverage term for that insured. After Lockton Affinity has non-renewed all insureds whose home state is New York, Underwriters shall promptly file a certification with the Department that sets forth their compliance with this Paragraph 24.

25. Underwriters agree not to issue or deliver in New York State an insurance policy, or otherwise issue an insurance policy covering an insured whose home state is New York, that provides legal services coverage, including, but not limited to, defense coverage in a criminal proceeding.

26. Underwriters agree not to issue or deliver in New York State an insurance policy, or otherwise issue an insurance policy covering an insured whose home state is New York, that compensates any broker, agent or other entity in a manner that would constitute either an illegal inducement to the making of insurance or after insurance has been effected, an illegal rebate from the premium which is not specified in the insurance policy, or illegal valuable consideration or inducement of any kind, directly or indirectly, which is not specified in the insurance policy.

Full and Complete Cooperation of Underwriters

27. Underwriters commit and agree to fully cooperate with the DFS Investigation and all terms of

this Consent Order. Such cooperation shall include, without limitation:

a. producing all non-privileged documents and other materials to the Department, as requested, wherever located in the possession, custody, or control of Underwriters;

b. requiring employees or agents to appear for interviews, at such reasonable times and places, as requested by the Department;

c. responding fully and truthfully in a prompt manner to all inquiries when requested to do so by the Department; and

d. testifying at hearings, trials and other judicial, administrative or other proceedings, when requested to do so by the Department, in connection with its investigation of matters relating to the NRA Programs.

Breach of Consent Order

28. If the Department believes Underwriters, or any individual Underwriter, to be in material breach of this Consent Order, the Department will provide written notice to such Underwriter or Underwriters, and such Underwriter or Underwriters must, within ten business days of receiving such notice, or on a later date if so determined in the Department's sole discretion, appear before the Department to demonstrate that no material breach has occurred or, to the extent pertinent, that the breach is not material or has been cured.

29. The parties understand and agree that the failure of Underwriters or such Underwriter to make the required showing within the designated time-period shall be presumptive evidence of any such Underwriter's breach. Upon a finding that an Underwriter or Underwriters have breached this Consent Order, the Department has all the remedies available to it under New York Insurance and Financial Services Law and may use any evidence available to the Department in any ensuing hearings, notices, or orders.

Waiver of Rights

30. The parties understand and agree that no provision of this Consent Order is subject to review in any court or tribunal outside the Department.

Parties Bound by the Consent Order

31. This Consent Order is binding on the Department and Underwriters, as well as any successors and assigns. This Consent Order does not bind any federal or other state agency or any law enforcement authority.

32. No further action will be taken by the Department against Underwriters for the specific conduct set forth in this Consent Order, provided that Underwriters comply fully with the terms of this Consent Order, including Paragraph 27 above.

33. Notwithstanding any other provision contained in this Consent Order, the Department may

undertake action against any Underwriter for transactions or conduct that such Underwriter did not disclose to the Department in the written materials that such Underwriter submitted to the Department in connection with this matter.

Notices

34. All notices or communications regarding this Consent Order shall be sent to:

For the Department:

Hadas Jacobi
Assistant Deputy Superintendent
for Enforcement
New York State Department of Financial Services
One State Street
New York, NY 10004

Connor Mealey
Excelsior Fellow
New York State Department of Financial Services
One State Street
New York, NY 10004

For Underwriters:

Michael P. Murphy
Partner, Global Chair, Insurance and Reinsurance
DLA Piper LLP (US)
1251 Avenue of the Americas
New York, NY 10020

Catherine Marshall
Head of Compliance
Tokio Marine Kiln
20 Fenchurch Street
London, EC3M 3BY
United Kingdom
For the Members of Lloyd's Syndicate No. 0510 acting through their managing agent, Tokio Marine Kiln Syndicates Limited.

James Cox
Compliance Director Lloyd's Building
1 Lime Street
London, EC3M 7DQ United Kingdom
For the Members of Lloyd's Syndicate No. 0609 acting through their managing agent, Atrium Underwriters Ltd.

David Jones
Compliance Director
Hasilwood House
60 Bishopsgate
London, EC2N 4AW
United Kingdom
For the Members of Lloyd's Syndicate No. 0727 acting through their managing agent, S.A. Meacock & Company Limited.

The Company Secretary
Gallery 9
One Lime Street
London, EC3M 7HA
United Kingdom
For the Members of Lloyd's Syndicate No. 0958 acting through their managing agent, Canopius Managing Agents Limited.

Paul Armfield
Compliance Manager
Chaucer Syndicates
Plantation Place
30 Frenchurch Street
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For the Members of Lloyd's Syndicate No. 1084 acting through their managing agent, Chaucer Syndicates Limited.

Toby Mills
Head of Compliance - EMEA
ArgoGlobal
1 Fen Court
London, EC3M 5BN
United Kingdom
For the Members of Lloyd's Syndicate No. 1200 acting through their managing agent, Argo Managing Agency Limited.

General Counsel
Exchequer Court
33 St Mary Axe
London EC3A 8AA
United Kingdom
For the Members of Lloyd's Syndicate No. 1206 acting through their managing agent, AmTrust Syndicates Limited.

Tim Harmer, Group Director of Legal and Compliance
Brit Insurance
122 Leadenhall Street
London, EC3V 4AB
United Kingdom
For the Members of Lloyd's Syndicate No. 2987 acting through their managing agent, Brit Syndicates Limited.

The Company Secretary
Gallery 9
One Lime Street
London, EC3M 7HA
United Kingdom
For the Members of Lloyd's Syndicate No. 4444 acting through their managing agent, Canopius Managing Agents Limited.

Nigel Davenport, Group General Counsel
Liberty Specialty Markets
20 Fenchurch Street,
London, EC3M 3AW
United Kingdom
For the Members of Lloyd's Syndicate No. 4472 acting through their managing agent, Liberty Managing Agency Limited.

Miscellaneous

35. Each provision of this Consent Order shall remain effective and enforceable until stayed, modified, suspended, or terminated by the Department.

36. No promise, assurance, representation, or understanding other than those contained in this Consent Order has been made to induce any party to agree to the provisions of the Consent Order.

IN WITNESS WHEREOF, the parties have caused this Consent Order to be signed this 20th day of December, 2018.

UNDERWRITERS AT LLOYD'S, LONDON

By: _____

CHARLES FRANKS

Group Chief Executive Officer

For the Members of Lloyd's Syndicate No. 0510 acting through their managing agent, Tokio Marine Kiln Syndicates Limited.

NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES

By: /s/ Maria T. Vullo
MARIA T. VULLO
Superintendent of Financial Services

By: /s/ Matthew L. Levine
MATTHEW T. LEVINE
Executive Deputy Superintendent for Enforcement

IN WITNESS WHEREOF, the parties have caused this Consent Order to be signed this ___ day of December, 2018.

UNDERWRITERS AT LLOYD'S, LONDON

By: Charles Franks

CHARLES FRANKS

Group Chief Executive Officer

For the Members of Lloyd's Syndicate No. 0510 acting through their managing agent, Tokio Marine Kiln Syndicates Limited.

NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES

By: /s/ Maria T. Vullo

MARIA T. VULLO
Superintendent of Financial Services

By: _____

MATTHEW T. LEVINE
Executive Deputy Superintendent for Enforcement

By: /s/ Richard Harris

RICHARD HARRIS

Chief Executive Officer

For the Members of Lloyd's Syndicate No. 0609 acting through their managing agent, Atrium Underwriters Ltd.

By: /s/ Richard Harris

KARL W. JARVIS

Chief Executive Officer

For the Members of Lloyd's Syndicate No. 0727 acting through their managing agent, S.A. Meacock & Company Limited.

By: /s/ Mike Duffy

MIKE DUFFY

Chief Executive Officer

For the Members of Lloyd's Syndicate No. 0958 acting through their managing agent, Canopius Managing Agents Limited.

By: /s/ R. W. Barnett

RICHARD BARNETT

Company Secretary and General Counsel

For the Members of Lloyd's Syndicate No. 1084 acting through their managing agent, Chaucer Syndicates Limited.

By: /s/ Dominic Kirby

DOMINIC KIRBY

Managing Director

For the Members of Lloyd's Syndicate No. 1200 acting through their managing agent, Argo Managing Agency Limited.

By: /s/ Sheldon Lacy

SHELDON LACY

Chief Risk Officer

For the Members of Lloyd's Syndicate No. 1206 acting through their managing agent, AmTrust Syndicates Limited.

By: /s/ Tim Harmer

TIM HARMER

Group Director of Legal and Compliance

For the Members of Lloyd's Syndicate No. 2987 acting through their managing agent, Brit Syndicates Limited.

By: /s/ Mike Duffy

MIKE DUFFY

Chief Executive Officer

For the Members of Lloyd's Syndicate No. 4444 acting through their managing agent, Canopius Managing Agent Limited

By: /s/ Nigel Davenport

NIGEL DAVENPORT

Group General Counsel

For the Members of Lloyd's Syndicate No. 4472 acting through their managing agent, Liberty Managing Agency Limited

NEW YORK STATE DEPARTMENT
OF FINANCIAL SERVICES

In the Matter of

LOCKTON AFFINITY, LLC and
LOCKTON COMPANIES, LLC

SUPPLEMENTAL CONSENT ORDER UNDER ARTICLES 21, 23 AND 34 OF THE INSURANCE LAW

(Filed Jan. 31, 2019)

Lockton Affinity, LLC, on behalf of each of its separate operating series, one of which, Lockton Affinity Series of Lockton Affinity, LLC, is the successor entity to Lockton Risk Services, Inc. ("Lockton Affinity"), Lockton Companies, LLC, on behalf of each of its separate operating series ("Lockton Companies") (together, Lockton Affinity and Lockton Companies, "Lockton"), and the New York State Department of Financial Services (the "Department") (collectively, the "Parties") are willing to resolve the matters described herein without further proceedings.

WHEREAS, the Parties entered into a Consent Order on May 2, 2018 (the "2018 Consent Order"), pursuant to which Lockton conducted a Compliance Review and, since May 2, 2018, has reported to the Department on the results of the Compliance Review;

WHEREAS, as a result of the Compliance Review, Lockton has identified to the Department certain

additional violations of New York laws and regulations, which are set forth below in the "Violations" section of this Supplemental Consent Order (the "Additional Violations");

NOW THEREFORE, to resolve this matter without further proceedings, pursuant to Articles 21, 23 and 34 of the Insurance Law, Lockton Affinity, Lockton Companies, and the Department hereby stipulate and agree as follows:

VIOLATIONS OF LAW AND REGULATIONS

1. Lockton Affinity compensated certain unlicensed entities, in violation of Insurance Law § 2116.

2. Lockton acted for and aided unauthorized insurers in connection with these insurers issuing policies in New York State, or otherwise issuing policies covering insureds whose home state is New York, that provided coverage that may not be offered in the New York State excess line market, including punitive damage coverage, psychological counseling expenses, and defense coverage in a criminal proceeding in violation of Insurance Law § 2117, except that unlike the policies addressed in the 2018 Consent Order, none of the policies covered by this Supplemental Consent Order were specific to firearm usage that provides liability coverage for bodily injury or property damage from use of a firearm, or for liability coverage for bodily injury or property damage expected or intended from the insured's standpoint to extend beyond those occasions

where bodily injury results from the use of reasonable force to protect persons or property.

3. Lockton procured from unauthorized insurers impermissible group policies covering insureds whose home state is New York, as neither Insurance Law Article 34 nor Insurance Regulation 135 (11 N.Y.C.R.R. § 153) authorize the insurers to write the group property/casualty insurance procured by Lockton Affinity and Lockton Companies.

4. Lockton Affinity advertised the financial condition of unauthorized insurers, in violation of Insurance Law § 2122(a)(1).

5. Lockton Affinity called attention to unauthorized insurers by issuing advertising materials that reference the unauthorized insurers by name, in violation of Insurance Law § 2122(a)(2).

6. Lockton failed to properly secure declinations from authorized insurers, in violation of Insurance Law § 2118(b)(3).

7. Lockton failed to make the required disclosure and obtain the required writing when an insured was an exempt commercial purchaser, in violation of Insurance Law § 2118(b)(3)(F).

8. Lockton Affinity failed to properly pay excess line premium taxes with respect to certain group policies, in violation of § 2118(d).

SETTLEMENT PROVISIONS

Civil Monetary Penalty

9. Lockton shall pay a civil monetary penalty to the Department pursuant to Articles 21, 23 and 34 of the Insurance Law in the amount of $400,000.00. Lockton shall pay the entire amount within ten days of executing this Consent Order. Lockton agrees that it will not claim, assert, or apply for a tax deduction or tax credit with regard to any U.S. federal, state, or local tax, directly or indirectly, for any portion of the civil monetary penalty paid pursuant to this Consent Order. Lockton further agrees that it will not claim, seek, or receive indemnification of the civil monetary penalty from any other person or entity. This provision is not intended, and shall not be construed, to prohibit Lockton affiliates from funding inter-company transfers to Lockton.

Remediation

10. To the extent not previously submitted in connection with the 2018 Consent Order, Lockton shall submit a plan for remediation of any of the Additional Violations identified by Lockton.

11. All other terms and conditions of the 2018 Consent Order remain in full force and effect.

12. Lockton agrees that if the Department makes a determination that any sponsor of an affinity group illegally marketed an affinity-type policy sold or underwritten by Lockton that includes criminal

defense coverage that may not be offered in New York, Lockton will not enter into any agreement or program with the sponsor to sell, underwrite, or otherwise participate in any affinity-type insurance program involving any line of insurance to be issued or delivered in New York State.

Breach of Consent Order

13. If the Department believes Lockton Companies or Lockton Affinity to be in material breach of this Supplemental Consent Order, the Department will provide written notice to Lockton Companies and/or Lockton Affinity and Lockton Companies and/or Lockton Affinity (as the case may be) must, within ten business days of receiving such notice, or on a later date if so determined in the Department's sole discretion, appear before the Department to demonstrate that no material breach has occurred or, to the extent pertinent, that the breach is not material or has been cured.

14. The Parties understand and agree that Lockton Companies' and/or Lockton Affinity's failure to make the required showing within the designated time period shall be presumptive evidence of such party's breach. Upon a finding that Lockton Companies and/or Lockton Affinity has breached this Supplemental Consent Order, the Department has all the remedies available to it under the New York Insurance and Financial Services Laws, and any other law, and may use any evidence available to the Department in any ensuing hearings, notices, or orders.

Waiver of Rights

15. The Parties understand and agree that no provision of this Supplemental Consent Order is subject to review in any court or tribunal outside the Department.

Parties Bound by the Consent Order

16. This Supplemental Consent Order is binding on the Parties, as well as any successors and assigns. This Supplemental Consent Order does not bind any federal or other state agency or any law enforcement authority.

17. No further action will be taken by the Department against Lockton arising out of the Additional Violations.

18. Notwithstanding any other provision contained in this Supplemental Consent Order, the Department may undertake action against Lockton for transactions or conduct to the extent that transactions or conduct of that type were not disclosed by Lockton to the Department in connection with the Compliance Review.

Notices

19. All notices or communications regarding this Supplemental Consent Order shall be sent to:

For the Department:

Hadas Jacobi
Assistant Deputy Superintendent
for Enforcement
New York State Department of
Financial Services
One State Street
New York, NY 10004

Megan Prendergast
Deputy Superintendent for Enforcement
New York State Department of
Financial Services
One State Street
New York, NY 10004

Connor Mealey
Attorney and Excelsior Fellow
New York State Department of
Financial Services
One State Street
New York, NY 10004

For Lockton Companies, LLC:

William Humphrey
Secretary
Lockton Companies
444 West 47th Street
Kansas City, MO 64112

Scott A. Edelman
Milbank, Tweed, Hadley & McCloy
28 Liberty Street
New York, NY 10005

Andrew R. Holland
Sidley Austin
787 Seventh Avenue
New York, NY 10019

For Lockton Affinity, LLC:

William Humphrey
Secretary
Lockton Affinity
444 West 47th Street
Kansas City, MO 64112

Scott A. Edelman
Milbank, Tweed, Hadley & McCloy
28 Liberty Street
New York, NY 10005

Andrew R. Holland
Sidley Austin
787 Seventh Avenue
New York, NY 10019

Miscellaneous

20. Each provision of this Supplemental Consent Order shall remain effective and enforceable until stayed, modified, suspended, or terminated by the Department.

21. No promise, assurance, representation, or understanding other than those contained in this Supplemental Consent Order has been made to induce any party to agree to the provisions of the Supplemental Consent Order.

[*remainder of page intentionally left blank*]

IN WITNESS WHEREOF, the parties have caused this Consent Order to be signed this 31st day of January, 2019.

LOCKTON COMPANIES, LLC, on behalf of each of its separate operating series,

By: /s/ William Humphrey
WILLIAM HUMPHREY
Secretary

LOCKTON AFFINITY, LLC, on behalf of each of its separate operating series,

By: /s/ William Humphrey
WILLIAM HUMPHREY
Secretary

NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES

By: _____
MARIA T. VULLO
Superintendent of Financial Services

By: _____
MATTHEW L. LEVINE
Executive Deputy Superintendent for Enforcement

IN WITNESS WHEREOF, the parties have caused this Consent Order to be signed this 31st day of January, 2019.

LOCKTON COMPANIES, LLC, on behalf of each of its separate operating series,

By: _____
WILLIAM HUMPHREY
Secretary

LOCKTON AFFINITY, LLC, on behalf of each of its separate operating series,

By: _____
WILLIAM HUMPHREY
Secretary

NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES

By: /s/ Maria Vullo
MARIA T. VULLO
Superintendent of Financial Services

By: /s/ Matthew Levine
MATTHEW L. LEVINE
Executive Deputy Superintendent for Enforcement

NEW YORK STATE
[SEAL] DEPARTMENT *of*
FINANCIAL SERVICES

Andrew M. Cuomo
Governor

Maria T. Vullo
Superintendent

April 11, 2018

Confidential Supervisory Communication – By E-Mail [redacted]

Joseph Gunset, Esq.
General Counsel
Lloyd's America Inc.
The Museum Office Building
25 W. 53rd St.
New York, NY 10019

Re: [redacted]

Dear Mr. Gunset:

[redacted]

[redacted]

Sincerely,

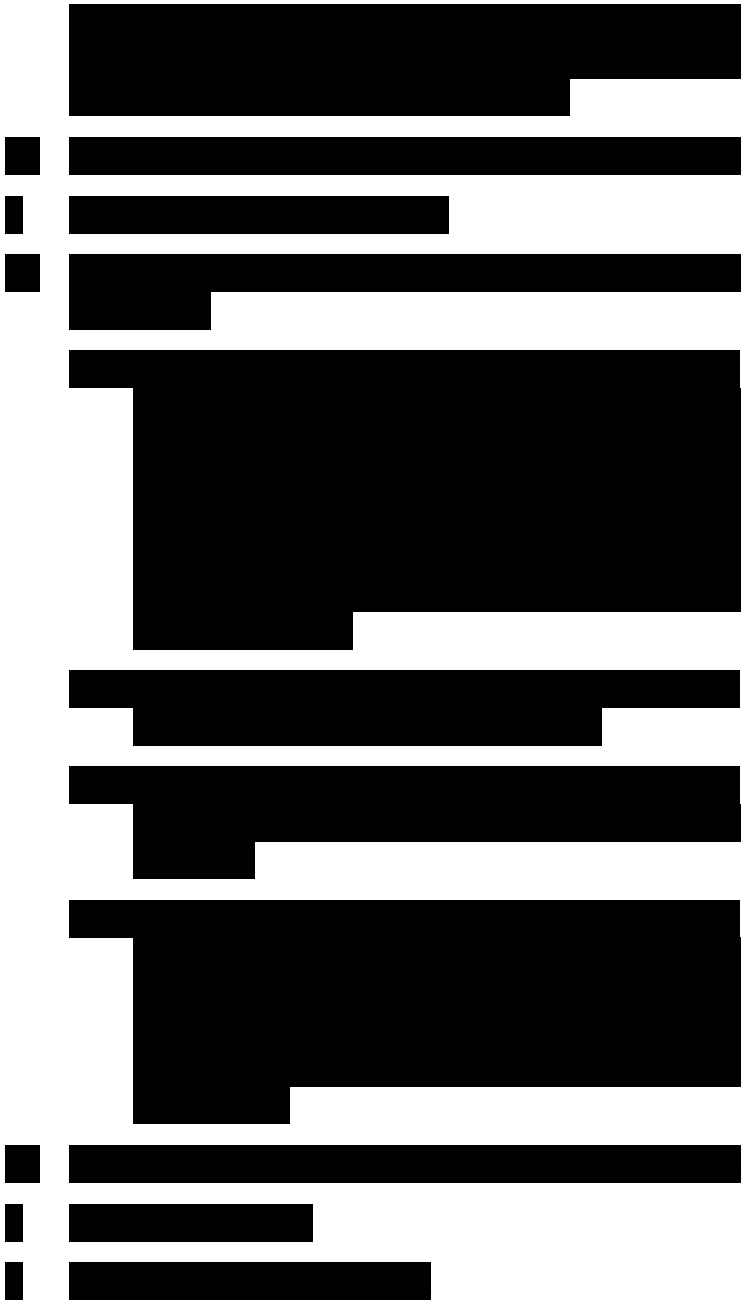
/s/ Matthew L. Levine
Matthew L. Levine
Executive Deputy Superintendent
for Enforcement

MINUTES OF THE BOARD MEETING
HELD ON TUESDAY 1 MAY 2018 AT 9:00hrs
IN THE BOARDROOM, FLOOR 11, LLOYD'S

Present: [redacted]

Apologies: [redacted]

[redacted]



[redacted]

There being no further discussion the meeting closed at 14:04.

[redacted]

From: [redacted]
Sent: Wednesday, May 09 20187:14:21 AM
To: [redacted]
Subject: [redacted]

[redacted]

Lloyd's

[redacted]