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ATTORNEYS & COUNSELORS

September 18, 2020

Via NYSCEF and glebovit@nycourts.gov

Hon. Gerald Lebovits
Supreme Court, Civil Branch, New York County
60 Centre Street
New York, NY 10007

Re: Commercial Division Assignment of *People of the State of New York v. The National Rifle Association, et al.*, Index No. 451625/2020

Dear Judge Lebovits:

On behalf of the National Rifle Association of America (the “NRA”), we write in response to the Court’s disclosure, dated September 14, 2020,¹ regarding the recent prior employment of your court attorney, Mark Shawhan, with the Division of Appeals and Opinions of the Office of the New York Attorney General. As an initial matter, the NRA concurs with the New York State Office of the Attorney General (the “NYAG”) that this matter, like other complex nonprofit dissolution cases, should properly be assigned to the Commercial Division.² If this matter is transferred to the Commercial Division per the NRA’s request by letter dated September 16, 2000 (Dkt. no. 26), any issue arising from Mr. Shawhan’s relationship to the NYAG may be obviated.

However, if this case remains before this Court, the NRA respectfully requests that Mr. Shawhan be insulated—and if this is impracticable, that Your Honor recuse. Although the NRA acknowledges and appreciates Mr. Shawhan’s representation to the Court that he neither worked on, nor has any knowledge of, this litigation, the NRA has reason to believe that the NYAG’s pursuit of its eventual dissolution case against the NRA began as early as 2017.³ In addition, court

¹ Hours prior to sending this letter, the NRA received notice from the NYAG that one of its counsel appearing herein, Monica Connell, formerly represented Your Honor in another matter. See Dkt. no. 29. The NRA will evaluate and address this new disclosure via a follow-up letter as soon as possible.

² See Rogers letter to Administrative Judge Kaplan, dated September 16, 2020 (Dkt. No. 26). The NYAG expressed the same view in its Request for Judicial Intervention filed August 6, 2020 (Dkt. No. 8). Although it is the NRA’s understanding that the matter was retained in this Court due to some uncertainty about whether an action to dissolve a nonprofit implicates a “business” within the meaning of the Commercial Division Rules, similar proceedings have properly been assigned to the Commercial Division. See, e.g. *People v. Donald Trump, et al.*, Index No. 451130/2018 (N.Y. Cty.); *In re Greater Capital Region Ass’n of Realtors, Inc.*, No.4459/2014 (Albany Cty.); *People v. Nat’l Coalition Against Breast Cancer*, No. 20432/2011 (Suffolk Cty.); *Springer v. Linden Seventh Day Adventist Church*, No. 30296/2008 (Kings Cty.); *People ex rel Spitzer v. Grasso*, No. 0401620/2004 (N.Y. Cty).

³ As detailed in a related, pending federal case, the NRA was warned by the previous Attorney General, Eric Schneiderman, in 2017 that an investigation was imminent. See *Nat’l Rifle Ass’n of Am. v. Letitia James*, Case No. 1:20-cv-00889-MAD-TWD (N.D.N.Y. filed Aug. 6, 2020). The current Attorney General made a campaign promise to promptly pursue the NRA upon taking office. See Press Release, New York State Office of the Attorney General, Tish James Announces Attorney General Platform To Protect New Yorkers From Gun Violence, Tish

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records suggest that Mr. Shawhan has continued to work with or for Attorney General James in some capacity during the pendency of the investigation, including as recently as February 2020.⁴ In light of the significant public profile of this matter, Mr. Shawhan’s day-to-day interactions with other NYAG personnel, including those who may have worked on the investigation but do not appear as counsel here, could have exposed him to opinions or insights which would violate the letter or spirit of Advisory Opinion 20-40.⁵ As Assistant Solicitor General, Mr. Shawhan held a high-ranking position with the NYAG, likely interfaced with Attorney General Schneiderman,, Acting Attorney General Barbara Underwood and Attorney General Attorney General James, and can reasonably be inferred to have been exposed to high-level strategy or planning discussions within the Office (including, potentially, NRA-related discussions). The NRA also notes that the NYAG’s disclosure received this afternoon (Dkt. No. 29) states that none of various enumerated NYAG personnel worked *directly* with Mr. Shawhan during his tenure at the Office—but the NRA also submits that it would be useful to know whether those personnel worked *indirectly* with Mr. Shawhan or had social relationships with him.

Moreover, both the ethical rules governing judicial conduct and the regulatory code of ethics for nonjudicial employees of the Unified Court System emphasize that courts and their employees should guard against even the mere potential appearance of impropriety or partiality.⁶ New York Court Rules mandate that judges require court personnel to observe the same standards of fidelity and diligence that apply to a judge;⁷ a judge, in turn, must disqualify himself if his impartiality could reasonably be questioned, including in situations where a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter.⁸ If Mr. Shawhan is held to the same standard, then his court appearances on behalf of the plaintiff in this matter, Attorney General James, favor insulating him.

James For Attorney General (July 12, 2018), <https://www.tishjames2018.com/press-releases/2018/7/12/taking-on-the-scourge-of-gun-violence-and-keeping-new-yorkers-safe/>. The NYAG’s investigation of the NRA formally commenced in April 2019. *See New York Investigating National Rifle Association’s Finances*, Associated Press, April 27, 2019, <https://apnews.com/abfecc7f1d56498d8b4a1ace6b1f84d8>.

⁴ *See, e.g., Pelaez v. State of N.Y. Exec. Dep’t Crime Victims Bd.*, 186 A.D.3d 831, 2020 N.Y. Slip Op. 04745 (Aug. 26, 2020). This matter was submitted February 18, 2020; the disposition identifies Mr. Shawhan as “of counsel” to the NYAG.

⁵ *See* Advisory Committee on Judicial Ethics Opinion 20-40, indicating that a court attorney formerly employed by counsel need not be insulated if he never “had any knowledge of” the case.

⁶ *See* 22 NYCRR 100.2(A) (“A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities. . . . A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary”); *see also* 22 NYCRR 50.1 (“Court employees shall avoid impropriety and the appearance of impropriety in all their activities.”).

⁷ 22 NYCRR 100.3(C)(2).

⁸ 22 NYCRR 100.3(E)(1).

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Finally, the NRA notes that this is a politically salient case, where Advisory Opinions rendered on more conventional facts may not provide fulsome guidance. The already-extensive media coverage of this matter has been rife with concerns and speculation about political bias.⁹ In this environment, even minor irregularities may impact the public's confidence in the impartiality of the judicial process. Combined with Your Honor's public statements regarding the Second Amendment and gun litigation,¹⁰ the court attorney's recent or ongoing work for the Attorney General (who campaigned on a promise to destroy the NRA)¹¹ may create an appearance of bias. Although the NRA does not question Your Honor's integrity or independence, this exceptional case, brought amid exceptional times, should inspire an exceptional degree of care to avoid even a potential inference of bias. At a minimum, the NRA believes that Mr. Shawhan should be insulated for these reasons. Consistent with its letter to Administrative Judge Kaplan seeking the same relief, the NRA also respectfully suggests that Your Honor consider referring this matter to the Commercial Division pursuant to 22 NYCRR 202.70(e).

⁹ See *Letitia James' Political Pot-Shots at the NRA*, New York Post, August 9, 2020, <https://nypost.com/2020/08/09/letitia-james-political-pot-shots-at-the-nra/>; Howard Husock, *An Affront to Civil Society*, City Journal, August 10, 2020, <https://www.city-journal.org/letitia-james-proposal-to-dissolve-nra>; Noah Feldman, *New York's Attorney General Shouldn't Dismantle the NRA*, Bloomberg Opinion, August 6, 2020, <https://www.bloomberg.com/opinion/articles/2020-08-06/new-york-s-attorney-general-shouldn-t-dismantle-nra-in-lawsuit>; David Cole, *The NRA Has a Right to Exist*, Wall Street Journal Opinion, August 26, 2020, https://www.wsj.com/articles/the-nra-has-a-right-to-exist-11598457143?reflink=share_mobilewebshare; Leslie Rutledge, *Guns, the NRA and the Second Amendment are Under Assault from the Left*, NBC News Opinion, August 21, 2020, <https://www.nbcnews.com/think/opinion/guns-nra-second-amendment-are-under-assault-left-nca1237712>.

¹⁰ The NRA refers to a panel hosted by New York Law School, which was posted to YouTube in January 2013, titled "Gun Control vs. the Right to Bear Arms." Appearing as a panelist, Your Honor expressed caution about commenting personally on the NRA's Second Amendment position ("if I were to express my personal view, I would really be shooting myself in the foot"), but stated: "I'm very fond of lawyers who can put an end to the dangers brought by tobacco and the dangers of negligent manufacturing and distribution of guns." *Gun Control v. the Right to Bear Arms*, New York Law School (uploaded Jan. 15, 2013), <https://www.youtube.com/watch?v=5FLXbpeYHfk>.

¹¹ See Press Release, New York State Office of the Attorney General, Tish James Announces Attorney General Platform To Protect New Yorkers From Gun Violence, Tish James For Attorney General (July 12, 2018), <https://www.tishjames2018.com/press-releases/2018/7/12/taking-on-the-scourge-of-gun-violence-and-keeping-new-yorkers-safe/>.

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Sincerely,

/s/ William A. Brewer III

William A. Brewer III

wab@brewerattorneys.com

Sarah B. Rogers

sbr@brewerattorneys.com

BREWER, ATTORNEYS & COUNSELORS

750 Lexington Avenue, 14th Floor

New York, New York 10022

Telephone: (212) 489-1400

Facsimile: (212) 751-2849

COUNSEL FOR THE NATIONAL
RIFLE ASSOCIATION OF AMERICA