20-3187

IN THE

United States Court of Appeals
for the
Second Circuit

NATIONAL RIFLE ASSOCIATION OF AMERICA,

Plaintiff-Appellant,

– v. –

ANDREW CUOMO, both individually and in his official capacity, NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT, dba Empire State Development, ERIC GERTLER, both individually and in his official capacity, NEW YORK STATE DEPARTMENT OF LABOR, Room 134 Bldg. 12, The State Campus, Albany, NY 12240, ROBERTA REARDON, both individually and in her official capacity,

Defendants-Appellees.

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

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases PAGE(S)

Statutes

Other Authorities

I.
PRELIMINARY STATEMENT

Plaintiff-Appellant the National Rifle Association of America (the "NRA") submitted its Opening Brief in support of its Appeal on December 28, 2020 (the "Opening Br."). Defendants-Appellees (the "Defendants") have advanced four principal arguments in their brief opposing the NRA's Appeal ("Defendants' Br.").

First, Defendants contend that the Appeal is moot because Executive Order 202.8's statewide ban on the operation of "non-essential" businesses that would shutter retailers of firearms and ammunition, providers of firearm education and safety and shooting ranges, is supposedly "no longer in effect." They claim that there is no "reasonable likelihood" that the State will direct the closure of such businesses again. Defendants, however, must show that events have "completely and irrevocably eradicated" the effects of the alleged violation. This they have failed to do. The facts set forth in Defendants' brief show that the State has not repudiated the possibility of closing "non-essential" businesses within the State. To the contrary, the COVID-19 response framework that Defendants tout in their brief makes clear that "non-essential" businesses can be closed anytime, anywhere the State deems a COVID-19 outbreak requires such closure. And, despite Defendants' reliance on the future efficacy of the State's vaccination program, COVID-19 cases in New York are actually spiking, making additional closures of businesses under the State's scheme more than a mere possibility.

Therefore, the violations of the Second, Fifth and Fourteenth Amendments created by the Executive Orders at issue are very much extant and immediate. The injunctive and declaratory relief requested by the NRA to permit retailers of firearms and ammunition, providers of firearm education and safety and shooting ranges to remain open as "essential" businesses is necessary to remedy those violations.

Second, Defendants argue that the District Court's decision should be affirmed, and that the NRA's proposed Second Amended Complaint is futile, because the NRA has failed to sufficiently plead its own injury-in-fact. They concede that the NRA's allegations of injury set forth in the proposed Second Amended Complaint arguably sufficiently plead the requisite injury under this Court's precedent. Instead, Defendants argue that the proposed Second Amended Complaint suffers from a "prudential standing problem," and that the NRA must identify an "impediment" that prevents its members from suing to vindicate their own rights. They further argue that an additional "prudential standing problem" is that the NRA cannot vindicate its members' Second Amendment rights.

Defendants are wrong. As an initial matter, the "prudential limitation" on standing has been called into question by the United States Supreme Court and by this Court, and is therefore no longer applicable to the question of standing.

In any event, under relevant precedent, the NRA need not show an obstacle to its members suing on their own behalf. Moreover, the NRA has sufficiently alleged

violations of core Second Amendment rights, and it can properly vindicate not only its own Constitutional rights, but those of its members.

Third, the NRA recognizes that Second Circuit precedent is unique in that it denies associational standing for claims brought under 42 U.S.C. § 1983. Nevertheless, as argued to the District Court and in its Opening Brief, the NRA contends that this position is inconsistent with Supreme Court precedent (and many other Circuit Courts of Appeal) and that the time has come for this Court to revisit its outlying view. Rather than engage with the arguments set forth in the NRA's Opening Brief, Defendants simply rely on past decisions of this Court. Furthermore, they concede that the Supreme Court has, at a minimum, presumed that an organization seeking to vindicate its members' rights has standing to prosecute a § 1983 action on the basis of those members' alleged injuries. That concession supports the NRA's argument. It is therefore respectfully submitted that this Court should hold that an organization suing under § 1983 be permitted to do so based on its members' alleged harm.

Finally, Defendants argue that the Eleventh Amendment precludes the award of nominal damages against Defendants in their official capacities. This argument is a red herring. The proposed Second Amended Complaint alleges ongoing violations of the NRA and its members' Constitutional rights, and the NRA properly

seeks prospective injunctive and declaratory relief to remedy those violations. Such relief is not barred by Eleventh Amendment immunity.

For the reasons set forth below, and in the NRA's Opening Brief, the NRA respectfully requests that the Decision and Order of the District Court be reversed, and that the case be remanded for further proceedings.

II.
ARGUMENT

A. The NRA's Appeal of the District Court's Ruling is Not Moot

Defendants argue that the NRA's request for declaratory and injunctive relief has been rendered moot because Executive Order 202.8 "is no longer in effect," but rather, has been "superseded" by the State's "New York FORWARD" program, a "four-phase plan for reopening the sectors of the economy that the prohibition had affected." (Defendants' Br. at 28). They contend that under New York FORWARD, regions within the State "progress through the phases by achieving various benchmarks concerning COVID-19 containment," and "as regions progress, increasingly more businesses are allowed to resume in-person operation subject to applicable Health Department guidelines." (*Id*. at 28-29). Defendants assert that since August 2020, all regions of the State have been in the plan's fourth and final phase, and that "[a]ll retail stores—essential and non-essential—may now operate in-person," subject to certain requirements such as wearing masks. (*Id*. at 29). In addition, they state that "certain sports and recreation enterprises, including shooting

ranges, may now conduct in-person operations as well, subject to similar health protocols." (*Id*. at 29-30).

Therefore, Defendants urge, "the gun-industry businesses that plaintiff identifies in its request for declaratory and injunctive relief may operate in-person today," and "there is no reasonable prospect that they will be prevented from doing so in the foreseeable future by a regime comparable to the statewide ban on in-person operation of non-essential businesses that had been instituted via Executive Order 202.8." (*Id*. at 33-34).

Significantly, however, Defendants concede that in response to "COVID-19 clusters that the State observed in September and October 2020," the State "implemented the 'Cluster Action Initiative,'" which "authorizes the imposition of heightened restrictions" in "geographic micro-areas in which problematic COVID-19 clusters are detected," for "the length of time necessary to bring the clusters under control." (*Id*. at 31). Under that program, non-essential businesses must "pause in-person operations for such time as the area in which they are located is designated a 'red zone.'" (*Id*. at 31-32).

It is well settled that a defendant's "voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Serv. Emp. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012). A voluntary

change of conduct only renders a case moot if the defendant demonstrates both that "(1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 603 (2d Cir. 2016). A government defendant claiming mootness on the basis of voluntary cessation "bears the formidable burden of showing that it is *absolutely clear* the allegedly wrongful behavior could not reasonably be expected to recur." *Id*. at 603-04 (emphasis in original) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)).

Defendants fail to meet this formidable burden. Rather than it being "absolutely clear" that the State's restrictions on "non-essential businesses"—including retailers of firearms and ammunition, shooting ranges and providers of firearm education and safety—could not reasonably be expected to reoccur, Defendants' own facts show the opposite. Indeed, Defendants cannot say, and do not even attempt to suggest, that events have "completely and irrevocably eradicated" the effects of Defendants' alleged violation.

Defendants in fact concede that State regulations currently in place call for re-imposition of COVID-19 restrictions in any part of the State deemed a "red zone," including the closure of "non-essential" businesses. Importantly, Defendants do not contend that the State will *not* re-impose the challenged closures. To the contrary,

the current "New York FORWARD" protocols described by Defendants explicitly provide that such closures *can be re-imposed* in "red zones" designated by the State. To blunt this fact that is fatal to their mootness argument, Defendants rely on statistics concerning the State's vaccination program, contending it makes COVID-19 surges "less likely, or at least less extensive." (*Id*. at 32). Whatever the eventual effectiveness of the State's vaccination program, it is indisputable that the program has not now "eradicated" the potential of further "non-essential" business closures, as set out in the State's current framework of mandating closures in State-determined "red zones." Furthermore, as a practical matter, and despite Defendants' rosy scenario, New York State is in fact currently experiencing a surge in COVID-19 cases.[1] (*See also* Opening Br. at 32).

This issue was addressed in *Dark Storm Industries LLC v. Cuomo* in July 2020, following the State's "relaxation" of certain Executive Orders, including

[1] According to news reports, for the week ending March 28, 2021, cases in New York State increased by 64% compared to the previous week, the largest surge during that period in the country. The surge "ranked New York first among states where coronavirus was spreading the fastest on a per-person basis, a USA TODAY Network analysis of Johns Hopkins University data showed." The rate surpassed the national average. In addition, the State's COVID-19 positivity rate "has stayed persistently above 3% for more than a month and is starting to grow — even as vaccines become more available." *See* Mike Stucka and Joseph Spector, *New York Led the Nation in New COVID Cases Last Week With a 64% Surge*, Rochester Democrat and Chronicle, March 30, 2021, found at https://www.democratandchronicle.com/story/news/2021/03/29/covid-cases-soar-new-york-by-county/115649718/. *See also* Brian Sharp, *Are We Entering Another COVID Surge? Mendoza Says Yes, Blames More Contagious Variants*, Rochester Democrat and Chronicle, April 8, 2021, found at https://www.democratandchronicle.com/story/news/2021/04/08/covid-cases-monroe-county-surge-more-contagious-variants-blamed/7145073002/ (quoting Monroe County public health commissioner Dr. Michael Mendoza: "We are entering another surge of the COVID-19 pandemic.").

Executive Order 202.8, allowing non-essential businesses to reopen on a regional basis. 471 F.Supp.3d 482, 492, 494 (N.D.N.Y. 2020), *appeal pending*, No. 20-2725 (2d Cir.). There, in connection with a similar challenge to the State's closure of firearm shops as "non-essential" businesses, the district court held that the defendants had failed to meet their burden on the first step of the voluntary cessation analysis because "there is a reasonable expectation that New York might be forced to shut down once again," in light of a potential new wave of COVID-19 infections. *Id*. at 494. Thus, "it cannot 'be said with assurance that there is no reasonable expectation that the alleged violation will recur.'" *Id*. at 494-95. The court in *Dark Storm Industries* also found that the State's own "reopening plan appears to contemplate just such a renewed shutdown," as outlined by the Defendants in this case. *Id*. at 495. The court noted that the State defendants have "made no commitment that they will not reinstate the shutdown orders should COVID-19 spread increase yet again." *Id*. Therefore, because the court could not "conclude that it is absolutely clear that the parties will not resume the challenged conduct," the plaintiffs' claims were not moot. *Id*. The identical facts in this Appeal compel the same result.

Moreover, as this Court recently recognized, the United States Supreme Court has already rejected Governor Cuomo's mootness argument in connection with litigation concerning injunctive relief from the State's current restrictions on the

number of people permitted in houses of worship pursuant to Executive Order 202.68. *Agudath Israel of America v. Cuomo*, 983 F.3d 620, 625-26, 631, n.16 (2d Cir. 2020). This Court expressly rejected a similar mootness argument: "It is clear that this matter is not moot ... [and that] injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified as red or orange." *Id*. at 631, n.16 (quoting *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 68 (2020) (per curiam)). Directly applicable in this Appeal, the Supreme Court found that Governor Cuomo "regularly changes the classification of particular areas without prior notice. If that occurs again, the reclassification will almost certainly bar individuals in the affected area from attending services before judicial relief can be obtained." *Roman Catholic Diocese of Brooklyn*, 141 S.Ct. at 68. *Accord, Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1230, n.1 (9th Cir. 2020) (rejecting mootness argument regarding Nevada Governor's emergency directive limiting the number of people at houses of worship and stating that, "[a]lthough the Directive is no longer in effect . . . Calvary Chapel's case is not moot. Governor Sisolak could restore the Directive's restrictions just as easily as he replaced them, or impose even more severe restrictions").

Without the injunctive and declaratory relief requested by the NRA, should closures of "non-essential" businesses return in parts of New York State, as they may on any given day, retailers of firearms and ammunition, shooting ranges and

providers of firearm education and safety, would once again be shuttered. Accordingly, this Appeal is not moot.

B. The NRA's Proposed Second Amended Complaint is Not Futile Because the NRA has Sufficiently Pled Injury-in-Fact and Does Not Suffer from a "Prudential Standing Problem"

As set forth in the NRA's Opening Brief, the District Court erred in not permitting the NRA to amend its First Amended Complaint, because contrary to the District Court's holding, the amendment is not futile. The NRA has established its organizational standing based on allegations of specific direct injury caused to the NRA and its mission by the Executive Orders at issue. (*See* Opening Br. at 17-31).

Defendants concede (Defendants' Br. at 40) that the allegations of harm set forth in the proposed Second Amended Complaint "arguably constitute the requisite injury" under *Moya v. United States Dep't of Homeland Security*, 975 F.3d 120 (2d Cir. 2020), discussed in the NRA's Opening Brief at 25-27. Nevertheless, Defendants argue that the proposed Second Amended Complaint suffers from a "prudential standing problem." (Defendants' Br. at 40). Defendants first assert that the NRA must identify an "obstacle that impaired the ability of its members to seek to vindicate their own rights." (*Id.* at 38). They further contend that even if the NRA sufficiently pleads its own injury, the NRA would only vindicate its own rights as a provider of firearms education and training. (*Id.* at 40-41). Specifically, they urge that the NRA's "only such claim is that Executive Order 202.8 violated its own Fifth

and Fourteenth Amendment rights, as a provider of firearms education and training, to be free from overly vague regulations." (*Id*. at 41). Thus, Defendants conclude, "even after *Moya*, plaintiff lacks standing to assert the proposed second amended complaint's Second Amendment claims, which are brought on behalf of—and could only have been brought on behalf of—individual New Yorkers." (*Id.*).

Defendants' arguments fail for at least two reasons.

1. The "Prudential" Limitation on Standing No Longer Applies

As Defendants concede, the prudential limitation on standing was called into question by the United States Supreme Court's decision in *Lexmark v. Static Control Components, Inc.*, 572 U.S. 118 (2014). (Defendants' Br. at 39, n.38). Nonetheless, Defendants contend this Court has continued to apply it. (*Id.*, citing, *inter alia*, *United States v. Suarez*, 791 F.3d 363, 367 (2d Cir. 2015)). Defendants also rely on *Keepers, Inc. v. City of Milford*, 807 F.3d 24 (2d Cir. 2015) for the proposition that a "prudential" requirement demands that the NRA show its members face an obstacle to sue on their own behalf.

This Court's decision in *New York State Citizens' Coalition for Children v. Poole*, 922 F.3d 69 (2d Cir. 2019) also cited *Keepers, Inc.* for that "prudential" proposition. But *New York State Citizens' Coalition for Children* reiterated, without deciding the issue, that "[t]here is considerable uncertainty as to whether the third-party standing rule continues to apply following the Supreme Court's recent decision

in *Lexmark* . . . [which] cast doubt on the entire doctrine of prudential standing…." 922 F.3d at 75.[2] This Court also noted that even though *Suarez*—relied on by Defendants—was decided after *Lexmark*, the Court did not address *Lexmark* in *Suarez*. *Id.*

Accordingly, because Defendants' assertion of a "prudential standing" limitation is inconsistent with recent developments in the Supreme Court and in this Court, that "prudential" requirement is no longer operative and is inapplicable to the Court's analysis of the NRA's organizational standing.

2. The NRA's Proposed Second Amended Complaint Does Not Suffer From a "Prudential Standing Problem"

Even if the "prudential standing" analysis were still applicable, Defendants' argument still fails.

a. The NRA has organizational standing to assert claims on behalf of its members and other third parties seeking to use its firearms training and education services.

Under this Court's precedent, all that is required for a litigant asserting organizational standing is that an injured party, such as the NRA's members, have a "mere 'practical disincentive to sue'—such as a desire for anonymity or the fear of

[2] *See also June Medical Services L. L. C. v. Russo*, 140 S.Ct. 2103 (2020) (Thomas, J., dissenting) ("[O]ur recent decision in *Lexmark* . . . questioned the validity of our prudential standing doctrine more generally. In that case, we acknowledged that requiring a litigant who has Article III standing to also demonstrate 'prudential standing' is inconsistent 'with our recent reaffirmation of the principle that 'a federal court's 'obligation' to hear and decide' cases within its jurisdiction 'is 'virtually unflagging.'").

reprisal," and such a disincentive "can suffice to overcome the third-party standing bar." *New York State Citizens' Coalition for Children*, 922 F.3d at 75 (citing *Keepers, Inc.*, 807 F.3d at 42). With respect to a politically controversial issue such as rights asserted under the Second Amendment, there is clearly such a disincentive. Moreover, during the unprecedented COVID-19 pandemic, the practical ability of individuals and businesses to undertake such legal action was undoubtedly limited.

Furthermore, courts in any event have "consistently held that a vendor has third party standing to pursue claims on behalf of its customers, regardless of whether a vendor's customers are hindered in bringing their own claims." *See Maryland Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 216 (4th Cir. 2020). In *Teixeira v. City of Alameda*, relied on by Defendants, the Ninth Circuit held that "vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." 873 F.3d 670, 678 (9th Cir. 2017) (citing *Craig v. Boren*, 429 U.S. 190, 195 (1976)). Thus, the court held that the plaintiff, as the would-be operator of a gun store, had standing to assert the subsidiary right to acquire arms on behalf of his potential customers. *Id.* *See also Ezell v. City of Chicago*, 651 F.3d 684, 696 (7th Cir. 2011) (supplier of firing-range facilities had standing to challenge Chicago ordinance banning firing ranges and "'act as an advocate of the rights of third parties who seek access to' its services").

As set forth in its Opening Brief, the NRA has sufficiently alleged that it was harmed and will continue to be harmed by the Executive Orders in the same manner as owners of firearm retailing, training, and education establishments across the State, because the NRA itself is involved in firearms training and education. (Opening Br. at 30, citing A-130). As an organization that offers firearms training and education, the NRA has standing to assert claims on behalf of third parties affected by the Executive Orders who are being denied such training and education, regardless whether those parties may be hindered in bringing their own claims.

b. The NRA is seeking to vindicate core Second Amendment rights on behalf of itself and its members.

As also pointed out by the NRA (*id.* at 19-20), because of the closure of shooting ranges, the NRA has alleged that the Executive Orders directly impact it and frustrate its ability to carry out its core services of firearms safety, education and training. Contrary to Defendants' contention, this is a core Second Amendment right that the NRA may vindicate on behalf of both itself and its members.

In that regard, this Court in *New York State Rifle & Pistol Association, Inc. v. City of New York*, observed that "the ability to obtain firearms training and engage in firearm practice is sufficiently close to core Second Amendment concerns that regulations that sharply restrict that ability to obtain such training could impose substantial burdens on core Second Amendment rights." 883 F.3d 45, 58 (2d Cir. 2018), *vacated as moot*, 140 S.Ct. 1525 (2020). Thus, some form of "heightened

scrutiny" would be warranted because "regulations amounting to a ban (either explicit or functional) on obtaining firearms training and practice substantially burden the core right to keep and use firearms in self-defense in the home." *Id.* Indeed, this Court assumed, without deciding, that the Seventh Circuit's holding in *Ezell* was correct that a ban on target shooting "substantially limits the right of law-abiding citizens to engage in the training and practice that would enable them to safely and effectively make use of firearms for defensive purposes in the home." *Id.* at 59.

Therefore, the NRA's own core Second Amendment rights, as well as its members', would be vindicated by injunctive and declaratory relief that shooting ranges and firearms safety educators dedicated to firearms training and practice are "essential businesses" not subject to the closures mandated by the Executive Orders.

This is consistent with *Teixeira v. City of Alameda*, relied on by Defendants. There, the court held that the Second Amendment does not protect an individual's right to sell firearms "unconnected to the rights of citizens to 'keep and bear' arms." 873 F.3d at 686-87. However, the *Teixeira* court reasoned that while restrictions on a commercial actor's ability to enter the firearms market may have "little or no impact on the ability of individuals to exercise their Second Amendment right to keep and bear arms," the case would be different had the plaintiffs alleged "that residents are meaningfully restricted in their ability to acquire firearms." *Id.* at 687.

The court explained that cases after *District of Columbia v. Heller*, 554 U.S. 570 (2008) have "examined firearms restrictions 'with respect to the burden on a potential gun owner or user, even when the challenge is brought by a commercial actor engaged in supplying arms or related services.'" *Id.* The court cited *Ezell v. City of Chicago*, 846 F.3d 888 (7th Cir. 2017), which involved zoning regulations that so "severely limit[ed] where shooting ranges may locate" that they had the effect of "severely restrict[ing] the right of Chicagoans to train in firearm use at a range." *Id.* at 679. In *Ezell*, the challenges to the regulations in question were brought by commercial actors.[3] *Id.* at 687. Unlike the circumstances in *Teixeira*, however, the restrictions on shooting range locations at issue in *Ezell* "caused a Second Amendment injury because it 'severely limit[ed] Chicagoans' Second Amendment right to maintain proficiency in firearm use via target practice at a range,' not because a range operator has any protected interest in operating a shooting range in the city." *Id.*

Here, the NRA, as an organization dedicated to firearms education and training, is challenging the Executive Orders to the extent they would categorize all shooting ranges and firearms educators as "non-essential," thereby effectively banning all firearms training in any area where the State would shutter "non-

[3] Among the plaintiffs in *Ezell* were the Second Amendment Foundation and the Illinois State Rifle Association, two nonprofits that advocate for Second Amendment rights. 846 F.3d at 891, n.2.

essential" businesses. That is precisely the kind of blanket ban prohibited in *Ezell*, where the plaintiffs included nonprofit advocates for the Second Amendment, and is comparable to the situation envisaged in *Teixeira*. Thus, the NRA's cause of action under the Second Amendment vindicates not only its own rights, but the rights of all gun owners in the State whose core Second Amendment rights are infringed. *Accord, Maryland Shall Issue, Inc.*, 971 F.3d at 216 (holding that a firearms vendor had standing to pursue its individual Second Amendment claim, as well as standing to challenge the firearms restriction at issue "on behalf of potential customers like the Individual Plaintiffs and other similarly situated persons")[4]; *Ezell,* 651 F.3d at 696 (rejecting City of Chicago's argument "that the Second Amendment protects an individual right, not an organizational one," when the plaintiff, a supplier of firing-range facilities, was harmed by a firing-range ban).

C. The Second Circuit's Denial of Associational Standing for Claims Brought Under 42 U.S.C. § 1983 is Inconsistent with Supreme Court Precedent and Should be Overturned

The District Court held that the NRA lacked associational standing based on a limitation on associational standing that is "unique to the Second Circuit." (Opening Br. at 12, citing *Christa McAuliffe Intermediate School PTO, Inc. v. de*

[4] The Fourth Circuit in *Maryland Shall Issue, Inc.* held that the plaintiff firearms dealer there had both independent and third-party standing to bring a Second Amendment. Therefore, the court did not reach the question of standing with respect to the individual plaintiffs, and plaintiff Maryland Shall Issue, Inc., a non-profit membership organization that is dedicated to the advancement of gun owners' rights in Maryland. 971 F.3d at 210.

Blasio, 364 F.Supp.3d 253, 272, n.17 (S.D.N.Y. 2019)). However, this rule is contrary to United States Supreme Court precedent in *Warth v. Seldin*, 422 U.S. 490 (1975), *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), and subsequent authority. (*See* Opening Br. at 11-17).

Indeed, as discussed by the court in *Christa McAuliffe Intermediate School PTO*, Judge Jacobs in his dissent in *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, explained that "several of our sister circuits, unburdened by [*Aguayo v. Richardson,* 473 F.2d 1090 (2d Cir. 1973)], have applied the *Hunt* test for representational standing in § 1983 cases." 868 F.3d 104, 123 (2d Cir. 2017) (Jacobs, J., dissenting). Judge Jacobs further observed that the "Fifth and Sixth Circuits have expressly held that organizations possess standing to sue under § 1983 for violations of the rights of their members in such circumstances."[5] *Id*.

Judge Jacobs noted that the plaintiffs in *Centro de la Comunidad Hispana de Locust Valley* had preserved the argument that they had representational standing, stating that "*Aguayo* is contradicted by subsequent Supreme Court authority ... and is inconsistent with the principles underlying § 1983." *Id.* at 124. Judge Jacobs explained that "[t]his Circuit has adhered to *Aguayo* without ever expressly

[5] Citing *Church of Scientology v. Cazares*, 638 F.2d 1272, 1276–77 (5th Cir. 1981) and *Memphis Am. Fed'n of Teachers v. Board of Educ.*, 534 F.2d 699 (6th Cir. 1976); additional citations omitted.

considering the impact of *Warth* or *Hunt*." *Id.* at 123. With respect to *Nnebe v. Daus*, 644 F.3d 147 (2d Cir. 2011)—relied on by Defendants (Defendants' Br. at 36, 38)—Judge Jacobs further explained that *Nnebe* followed *Aguayo* over the objection that it had been cast into doubt by *Warth*, but that the Court in *Nnebe* stated that "we are bound by the *implicit determination* of prior panels that the rule survives *Warth* 'until such time as [our prior decisions] are overruled either by an en banc panel of our Court or by the Supreme Court.'" *Id.* (emphasis in original). Judge Jacobs concluded that the plaintiffs "may be right about *Aguayo*, and a time may come when we rethink organizational standing, or when the Supreme Court does an intervention." *Id.* at 124.

The NRA respectfully submits that the time has come. This Court should revisit its outlier position, and hold that organizations possess standing to sue under § 1983 for violations of the rights of their members.[6]

Rather than contend with *Warth*, *Hunt* and subsequent authority discussed by the NRA, Defendants instead state that the Supreme Court's decisions in

[6] Defendants cite to *New York State Citizens' Coalition for Children*, which was decided after Judge Jacobs's dissent in *Centro de la Comunidad Hispana de Locust Valley*. In *New York State Citizens' Coalition for Children*, this Court cited to *Nnebe* and *Aguayo* for the proposition that "[i]n a string of opinions, this Court has held that organizations suing under Section 1983 must, without relying on their members' injuries, assert that their own injuries are sufficient to satisfy Article III's standing requirements." 922 F.3d at 74-75. However, the Court did not undertake the analysis of *Warth* and *Hunt* urged by Judge Jacobs. It is this analysis that the NRA contends should now be undertaken.

Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, 508 U.S. 656 (1993) and *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254 (2015) (discussed in Opening Br. at 14-17) merely "presume" rather than "hold" that an organizational litigant seeking to vindicate its members' rights has standing to prosecute a § 1983 action on the basis of those members' alleged injuries. (Defendants' Br. at 37). Defendants offer that the parties in those cases "simply asked the Court to decide whether the presumed-valid theory of representational standing had been satisfied under the circumstances presented," and the Supreme Court "did just that, and nothing more." (*Id.*). This purported distinction urged by Defendants proves too much, however—if indeed the Supreme Court presumed organizational standing to prosecute a § 1983 action on the basis of the organizations' members' alleged injuries, then this Court's decisions holding to the contrary are untenable and should be revisited.

D. Defendants are Not Immune, Because the NRA Has Alleged Ongoing Constitutional Violations and Has Properly Demanded Prospective Declaratory and Injunctive Relief

It is well established that a plaintiff "may sue a state official acting in his official capacity—notwithstanding the Eleventh Amendment—for prospective injunctive relief from violations of federal law." *In re Deposit Ins. Agency*, 482 F.3d 612, 617 (2d Cir. 2007) (citing *Ex parte Young*, 209 U.S. 123 (1908)); *see also Nat'l Ass'n for Advancement of Colored People v. Merrill*, 939 F.3d 470, 476 (2d Cir.

2019) (plaintiff seeking "declaratory judgment and an injunction requiring Defendants to adopt a new districting plan for future elections" could maintain such claims against state officials in their official capacities).

Accordingly, regardless of whether a claim for nominal damages may be made against Defendants in their official capacities, because the NRA is seeking prospective injunctive and declaratory relief, its claims against Defendants are sufficiently pled.

Furthermore, as discussed in its Opening Brief (at 32), the District Court incorrectly held that the NRA's allegations of dedication of staff and resources to field phone calls and provide advice to members, as well as cancelling training events, were "insufficient to establish organizational standing to pursue a claim for injunctive or declaratory relief" because they were allegations of past injury that cannot be "redressed through the prospective injunctive and declaratory relief sought …." (A-184, citing *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 388 (2d Cir. 2015)).

The District Court's reliance on *Knife Rights* was misplaced. (*See also* Defendants' Br. at 38). There, this Court held that because the plaintiff alleged "only past infractions of [law], and not a continuing ... or ... future violation, injunctive relief will not redress its injury." 802 F.3d at 388 (citation omitted). The Court held that plaintiffs must show "that both anticipated expenditures and ensuing harm to their organizations' activities are 'certainly impending.'" *Id.* at 389. In *Knife Rights*,

such harm could not be shown by the plaintiff organizations because the harm they could show were past expenses they incurred in opposing the challenged statute banning certain knives. *Id.*

Here, however, contrary to the facts and circumstances found in *Knife Rights*, so long as the Executive Orders are in place, and the State has the right to shutter "non-essential" businesses at any time and any place as it sees fit, the expenses incurred by the NRA will certainly reoccur, as will the NRA's cancellation of firearms training and educational activities. Accordingly, the NRA maintains standing to assert its claims for injunctive and declaratory relief in order to redress the harms it will suffer should, for example, all shooting ranges once again close in any area deemed a "red zone" by the State.

Dearth v. Holder, 641 F.3d 499 (D.C. Cir. 2011) is instructive. There, the plaintiffs were Dearth, an American citizen who resided in Canada and no longer maintained a residence in the United States, as well as a non-profit organization that promotes the Second Amendment right to keep and bear arms. 641 F.3d at 501. Dearth challenged regulations promulgated by the Bureau of Alcohol, Tobacco, Firearms and Explosives, which precluded a person who lives outside the United States from lawfully purchasing a firearm in the United States. *Id.* at 500-01. The plaintiffs sought declaratory and injunctive relief, and the court held that "past injuries alone are insufficient to establish standing," rather, Dearth "must show he is

suffering an ongoing injury or faces an immediate threat of injury." *Id*. at 501. The Government argued that Dearth "cannot show he suffers either the 'continuing, present adverse effects,' or the 'sufficient likelihood of future injury,' necessary to support standing because he was not currently in the United States and he has no concrete plan to visit the United States." *Id.* at 502. Nonetheless, the D.C. Circuit held that Dearth maintained standing because his injury was not "conjectural," but "present and continuing" and "sufficiently real and immediate" in light of Dearth's intent to return to the United States, "only to face a set of laws that undoubtedly prohibit him from purchasing a firearm." *Id*. at 503.

Here, the State has not repudiated the substance of the Executive Orders. To the contrary, as set forth above (at pp. 4-7), the State retains the right to shutter "non-essential" businesses—including sellers of firearms, shooting ranges and firearms educators and trainers—at any time, in any place, depending on whether it alone determines COVID-19 rates in any given region of the State requires closing such businesses. As in *Dearth*, therefore, the NRA's injury is not conjectural, but present and continuing, and, indeed, sufficiently real and immediate, to maintain standing with respect to its claims for prospective injunctive and declaratory relief.

III.
CONCLUSION

For the reasons set forth above, and in its Opening Brief, the NRA respectfully requests that the judgment of the District Court be reversed, and the case be remanded for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Federal Rule of Appellate Procedure 32(g) that the attached brief is proportionally spaced, has a typeface (Times New Roman) of 14 points, and contains 5,771 words (excluding, as permitted by Federal Rule of Appellate Procedure 32(f), the cover page, the table of contents, the table of authorities, the certificate of compliance, and the signature block), as counted by the Microsoft Word processing system used to produce this brief.

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New York, New York

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