No. 22-842

In the Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA,
Petitioner,

v.

MARIA T. VULLO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE STATE OF MONTANA AND 17 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER AND REVERSAL

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INTEREST OF AMICI CURIAE[1]

Freedom of speech is "the matrix, the indispensable condition, of nearly every other form of freedom." *Palko* v. *Connecticut*, 302 U.S. 319, 327 (1937); *see also Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."). But that freedom is "under attack." *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2302-03 (2019) (Alito, J., concurring). And when that 'attack' comes in the form of government expression that abridges or regulates private speech, it is vital that federal courts police the lines between genuine government speech and "surreptitious[] regulation of private speech." *Shurtleff* v. *City of Boston*, 142 S. Ct. 1583, 1595-96 (2022) (Alito, J., concurring in the judgment) (citation and quotation marks omitted). So, to ensure that a vibrant and robust right of free private expression remains "ringed about with adequate bulwarks," *see Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66 (1963), the States of Montana, Alabama, Arkansas, Georgia, Iowa, Kansas, Kentucky, Louisiana, Missouri, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, and Wyoming, file this amicus brief in support of petitioner.

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[1] As required by Rule 37.2, counsel for *amici* notified counsel of record for all parties of its intent to file this brief more than ten days before its due date.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns troubling allegations of governmental abuse of power. As plausibly alleged, Maria Vullo, the head of New York's Department of Financial Services ("DFS"), a state agency tasked with sweeping regulatory authority over financial institutions, leveraged her official authority to stifle the NRA's constitutionally protected political speech. But even though Vullo's politically motivated campaign involved press releases, official regulatory guidance, and ongoing investigations that targeted financial institutions doing business with the NRA, she steered clear of any explicit threats in these communications, at least to the "disinterested ear." *NLRB* v. *Gissel Packing, Co.*, 395 U.S. 575, 619 (1969). But the financial institutions picked up the subtext: drop the NRA or else. *See* Pet.11, 24-27. Even so, after *Bantam Books*, these "informal sanctions" cannot sidestep First Amendment scrutiny. *See* 372 U.S. at 66-67. Yet, the decision below departed from that clear instruction and gave state officials license to target and crackdown on their political opponents' protected speech.

Bantam Books rejected a myopic focus on whether officials expressly threatened adverse consequences, and since then federal courts have largely followed suit. Courts thus consider all relevant context, including the official's actual (or apparent) regulatory authority, the specific language in the official's statements, and whether the targeted individuals or entities perceived the statements as threats. Not only

did the Second Circuit depart from this Court's precedent in *Bantam Books*, but it also departed from its own prior precedent and the precedent of six federal circuits. That split is direct and—without this Court's intervention—irreconcilable.

Despite this Court's clear warning to "exercise great caution before extending [the] government-speech precedents," the Second Circuit charged ahead and demonstrated that doctrine's "susceptib[ility] to dangerous misuse." *Matal* v. *Tam*, 137 S. Ct. 1744, 1758 (2017). Rather than safeguarding private expression against government regulation, the decision below subtly shifts the emphasis to safeguarding government expression—opening the door for governments to use the "government-speech doctrine … as a cover for censorship." *Shurtleff*, 142 S. Ct. at 1595 (Alito, J., concurring in the judgment).

The Second Circuit's decision gives government officials license to financially cripple their political opponents, or otherwise stifle their protected speech—whether those rivals advocate for school choice, abortion rights, religious liberty, environmental protections, or any other politically salient issue. As the ACLU argues, the decision gives "[p]ublic officials … a readymade playbook for abusing their regulatory power to harm disfavored advocacy groups

without triggering judicial scrutiny."[2] This Court should grant the petition and reverse.

ARGUMENT

I. The Second and Tenth Circuits have abandoned *Bantam Book*'s contextual approach to analyzing government coercion, splitting with at least six federal circuits.

Sixty years ago, this Court held that a state commission, without formal regulatory authority, violated the First Amendment when it sought to "suppress[] … publications" through "informal sanctions," such as the "threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation. *Bantam Books*, 372 U.S. at 66-67. Since then, federal courts look for informal censorship regimes by distinguishing between "attempts to convince" and "attempts to coerce" and weighing the defendants' regulatory authority over the targeted entity, the language used in the alleged threat, and whether the targeted entity reasonably perceived the statement as a threat. *See* Pet.13-14 (quoting *Backpage.com, LLC* v. *Dart*, 807 F.3d 229, 230-32 (7th Cir. 2015)); *see also infra* Sect.I.B.

But the Second Circuit's decision below flips this contextual approach on its head, focusing on whether

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[2] Br. of Amicus Curiae ACLU in Support of Pl.'s Opp. to Def.'s Mot. to Dismiss, *Nat'l Rifle Ass'n* v. *Cuomo*, No. 18-cv-0566, ECF No. 49-1 (N.D.N.Y. Aug. 24, 2018) ("ACLU Br."), at 4.

the government official's statements explicitly threatened adverse regulatory consequences. *See Nat'l Rifle Ass'n of Am.* v. *Vullo*, 49 F.4th 700, 716-17 (2d Cir. 2022) (finding that Vullo's remarks weren't threatening because they "were written in an evenhanded, nonthreatening tone," "employed words intended to persuade rather than intimidate," and "did not refer to any pending investigations or possible regulatory action"). That myopic focus on explicit threats conflicts with this Court's decision in *Bantam Books* and splits from the Second Circuit's prior precedent and with the precedent of the Third, Fourth, Seventh, Eighth, Ninth, and D.C. Circuits.

A. *Bantam Books* forbids government actors from using implicit threats and other coercive practices to stifle protected speech.

In *Bantam Books*, four New York publishers and a wholesale distributor raised a First Amendment challenge to a state commission's practice of investigating and deeming certain publications "objectionable for sale." 372 U.S. at 61. As part of its practice, the commission issued notices to distributors on official letterhead, which: (i) indicated that it deemed a certain publication objectionable; (ii) thanked the distributor in advance for "cooperat[ing];" (iii) noted its obligation to refer "purveyors of obscenity" for prosecution; and (iv) advised the distributor that a list of objectionable publications had been circulated to local police departments. *Id.* at 62-63 & n.5. Local police officers often visited shortly after distributors received the commission's notices to see what actions were

taken. *Id.* at 63. So, the distributor relented to avoid prosecution, ceasing further circulation of the listed publications and refusing to fill new orders. *Id.*

Even though the commission had no authority to "regulate or suppress obscenity" and it never expressly threatened to institute criminal proceedings against the distributor, this Court held that the commission's practices violated the First Amendment. *See id.* at 65-68. This Court "look[ed] through forms to the substance" and concluded that the commission's use of "informal sanctions"—*i.e.*, "threat[s]," "coercion, persuasion, and intimidation"—violated the First Amendment. *Id.* at 66-67. Nor did the lack of explicit threats render the distributor's compliance with the commission's notices voluntary. Rather, observing that "[p]eople do not lightly disregard public officers' thinly-veiled threats to institute criminal proceedings," the Court explained that, in context, "[i]t would be naïve to credit the State's assertion that these blacklists are in the nature of mere legal advice." *See id.* at 68-69.

B. Since *Bantam Books*, lower courts have evaluated informal censorship claims using a context-specific analysis.

In the six decades following *Bantam Books*, federal courts evaluating whether government officials have employed coercive means to stifle protected expression "look through forms to the substance," and focus on whether, in context, the official's words and conduct can be reasonably interpreted to threaten adverse consequences. *See id.* at 67.

1. The lower federal courts have largely heeded *Bantam Books*' instruction. For example, in *Okwedy* v. *Molinari*, a public official sent a letter to a private entity, asking it to remove a controversial message from one of its billboards. 333 F.3d 339, 341-42 (2d Cir. 2003). But in that letter, the official invoked his formal title and hinted that the entity "derive[d] substantial economic benefits from [other billboards]" in the area. *Id.* The Second Circuit found that the official's invocation of his title, as well as his reference to other economically-beneficial assets owned by the entity, reasonably suggested that the official "intended to use his official power to retaliate against it if it did not respond positively to his entreaties." *Id.* at 344. It didn't matter that the official "lacked direct regulatory control over the billboards." *Id.* Instead, the question was whether the defendant "threaten[ed] to employ coercive state power to stifle protected speech," whether through "direct regulatory or decisionmaking authority" or "in some less-direct form." *Id.*

Likewise, in *Backpage.com*, the Sheriff sent a letter to Visa and Mastercard demanding that they cease processing payments for ads on Backpage because some of those "ads might be for illegal sex-related products or services." 807 F.3d at 230. That letter—sent on official letterhead—included an ominous reference to the federal money laundering statute, suggesting that the credit card companies could be subject to prosecution if they didn't comply. *Id.* at 231, 234. Despite the Sheriff's lack of formal authority to take action against the credit card companies, the Seventh Circuit found that, especially given the Sheriff's

broader campaign against Backpage, his misuse of official authority to "attempt to intimidate" and "threaten[]" those companies violated the First Amendment. *See id.* at 236-37. Because the Sheriff's letter requested a "cease and desist," invoked the companies' legal obligations to cooperate with law enforcement, and required ongoing contact with the companies, the court found that the Sheriff's actions reasonably implied that the companies would face some government sanction if they didn't comply. *See id.* at 236. And large companies like Visa and Mastercard face significant incentives to cave to such threats, especially given the limited value of individual clients and the potential for significant liability or negative press if they refuse to comply. *See id.*

Similarly, in *Blankenship* v. *Manchin*, a coal executive publicly opposed a state constitutional amendment supported by the state governor. 471 F.3d 523, 525-26 (4th Cir. 2006). The governor responded, in a newspaper article, that "tougher scrutiny of [the executive's] business affairs" was "justified." *Id.* A few days after the measure failed, the threat of added regulatory scrutiny materialized. *Id.* at 526-27. In considering whether the governor's remarks were "threatening, coercive, or intimidating," the Fourth Circuit examined the "full context" of his remarks, including the increased regulatory scrutiny. *Id.* at 528-30 (citation omitted). Given that context, the court found that the governor's remarks could reasonably be seen "as a threat of increased regulatory scrutiny." *See id.* at 529-30.

Relatedly, in *Garcia* v. *City of Trenton*, a city mayor threatened to enforce a parking ordinance against a local business owner because of her repeated complaints about the city's failure to enforce another local ordinance. 348 F.3d 726, 727-28 (8th Cir. 2003). Before her complaints, the parking restriction was rarely enforced, but after, she received four parking citations in two months. *Id.* at 728. The Court found that the evidence was sufficient to send the First Amendment claim to the jury because the city had "engaged the punitive machinery of government in order to punish [the plaintiff] for her speaking out." *Id.* at 729.

2. Even when federal courts reject informal censorship claims, they evaluate government officials' statements in context. For example, in *R.C. Maxwell Co.* v. *Borough of New Hope*, a city council urged the owner of a billboard site to cancel its existing leases and remove the billboards. 735 F.3d 85, 86-87 & n.2 (3d Cir. 1984). The lessee sued, claiming that the city council's "exerti[on of] its sovereign power, coerced [the owner] to order the billboards removed," in violation of its First Amendment rights. *Id.* at 87. But the Third Circuit held that the city council's statements and conduct did "not rise to the level of state-coerced action." *See id.* at 88-89. Critical to its analysis was the city council's lack of regulatory authority and the absence of conduct suggesting adverse consequences would follow noncompliance. *See id.* Not only that, but the recipient of the alleged threats denied feeling "coerced or intimated," and claimed instead that his decision was made to "secure the good graces of the [city council]." *Id.* (explaining that actions taken "to

create a receptive climate for future [business] plans does not rise to the level of state-coerced action"). In sum, the city council's letters, "devoid as they were of any enforceable threats, amounted to nothing more than a collective expression of the local community's distaste for the billboards." *Id.* at 89.

Similarly, in *Am. Fam. Ass'n, Inc.* v. *City & Cnty. of S.F.*, the city adopted a resolution criticizing plaintiff's advertising campaign and urging local television stations not to air those messages. 277 F.3d 1114, 1119-20 (9th Cir. 2002). But apart from criticizing plaintiff's speech and urging television stations not to air it, "there was no sanction or threat of sanction" if the television stations "[ignored the] request and aired the advertisements." *Id.* at 1125. Nor was there any evidence that local television stations perceived the resolution as a threat. *See id.* And because "public officials may criticize practices that they would have no constitutional ability to regulate, so long as there is no actual or threatened imposition of government power or sanction," the Ninth Circuit rejected plaintiff's First Amendment claim. *Id.* at 1124-25.

And in *Penthouse Int'l, Ltd.* v. *Meese*, a commission tasked with studying the societal effects of pornography—lacking any direct legal or regulatory authority—sent a letter giving companies alleged to be involved in the distribution of pornography the opportunity to respond to those allegations before the commission drafted the final report and identified distributors. 939 F.2d 1011, 1012-13 (D.C. Cir. 1991). Recognizing that the commission may have come

"close to implying more authority than it had or explicitly claimed," the D.C. Circuit considered the commission's statements and conduct in context and found no "threat[] to use the coercive power of the state against the recipients of the letter." *Id.* at 1015. The Court also rejected the argument that the letter was an implicit threat to blacklist distributors because, at most, the commission threatened potential embarrassment. *See id.* at 1016 (expressing doubt that without a threatened sanction "the government's criticism or effort to embarrass the distributor threatens anyone's First Amendment rights.").

3. When federal courts evaluate claims of informal censorship by government officials, this much is clear: neither direct regulatory authority nor explicit threats are necessary to state a claim. To be sure, the presence of either (or both) makes the inquiry easier. After all, the commission in *Bantam Books* and the Sheriff in *Backpage.com* lacked direct regulatory authority over the targeted entities, but the courts still found that both exercised coercive state power to stifle protected speech. *See Bantam Books*, 372 U.S. at 68-69; *Backpage.com*, 807 F.3d at 233, 236. If the absence of direct regulatory authority didn't preclude finding a First Amendment violation in those cases, then surely the existence of such authority only makes it easier to find one. But even without direct regulatory authority, courts need not ignore government officials' "thinly-veiled threats" or "assertion[s] that … blacklists are in the nature of mere legal advice." *Bantam Books*, 372 U.S. at 68-69. As these cases show, federal courts have largely adhered to this requirement, even

if there is some disagreement at the margins about whether a government official's statement and conduct constitutes an implied threat to use a state's coercive power to suppress protected private speech.[3]

C. The Second and Tenth Circuits departed from this consensus approach, opting for a formalist focus on explicit threats.

Over the past two years, two federal circuits have departed from the context-specific inquiry broadly employed by the lower federal courts.

1. In a split decision, the Tenth Circuit stepped out of line first. *See VDARE Found.* v. *City of Colo. Springs*, 11 F.4th 1151 (10th Cir. 2021). *VDARE* involved a political advocacy group that maintained controversial views on U.S. immigration policy and reserved a resort in Colorado Springs for a future conference. *See id.* at 1156. A few months after VDARE reserved the resort, in August 2017, violence erupted at a political rally in Charlottesville, Virginia. *Id.* at 1157. Two days later, the Mayor of Colorado Springs issued the following statement:

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[3] To be sure, these cases don't stand for the proposition that government officials run afoul of the First Amendment simply because they warn regulated parties that they will prosecute—even vigorously so—conduct in violation of the laws they have lawful authority to enforce. Instead, courts look "through forms to the substance" to see if the official has used "threat[s]," "coercion, persuasion, and intimidation" to stifle protected expression they couldn't regulate directly. *See Bantam Books*, 372 U.S. at 66-67.

> The City of Colorado Springs does not have the authority to restrict freedom of speech, nor to direct private businesses like the Cheyenne Mountain Resort as to which events they may host. That said, I would encourage local businesses to be attentive to the types of events they accept and the groups that they invite to our great city.
>
> The City of Colorado Springs will not provide any support or resources to this event, and does not condone hate speech in any fashion. The City remains steadfast in its commitment to the enforcement of Colorado law, which protects all individuals regardless of race, religion, color, ancestry, national origin, physical or mental disability, or sexual orientation to be secure and protected from fear, intimidation, harassment and physical harm.

Id. The next day, the resort announced that it would not host the conference and it cancelled its contract with VDARE. *Id.* VDARE sued, arguing that the mayor's statement, considered in context, constituted a "'threat' or 'warning' to 'local businesses' not to contract with VDARE," and thus violated its First Amendment rights. *See id.* at 1057-60 (cleaned up).[4]

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[4] *VDARE* relied on *Blum* v. *Yaretsky*, 457 U.S. 991 (1982), to find that the mayor's statement didn't constitute state action, *see* 11 F.4th at 1160-61, 1164-68, but *Blum* doesn't control when courts evaluate informal government censorship claims. *Blum*

Instead of analyzing the mayor's statement, as a whole and in context, to determine if it constituted an implicit threat, the *VDARE* majority painstakingly analyzed each sentence of that statement in isolation. *See id.* at 1164-68. But even to the extent the majority ostensibly considered the surrounding context, it labored to construe VDARE's allegations in the mayor's favor. *See id.* And the majority's finding that the statement was not a "thinly veiled threat" anchored its conclusions that there was no state action and that VDARE failed to allege a viable First Amendment claim. *See id.* at 1164-68, 1170-75.

Relying on a strained reading of the mayor's statement, the majority rejected VDARE's claims because it found the statement wasn't "*significantly* encouraging or coercive." *Id.* at 1167. To get there, the majority played ostrich, reading each sentence in isolation and ignoring the natural import of the mayor's words. In doing so, the majority found that mayor's statement

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considered whether a private party's compliance with state regulations constituted state action, and it held that a state is responsible for private conduct "only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed that of the state." 457 U.S. at 1003-04. But it didn't consider the relevant question here: whether government threats designed to suppress private speech constitute state action. *Bantam Books*, however, addressed that precise question, and it found that the "acts and practices" of the state commission were conducted "under color of state law" and thus constituted state action. *See* 372 U.S. at 68.

included no plausible threats because he simply referenced the limits of his authority, never specifically mentioned VDARE or any distaste for its speech, and merely referenced Colorado law. *See id.* at 1164-66. The third sentence, that the City "will not provide any support or resources to this event and does not condone hate speech in any fashion," was a closer call. *See id.* at 1166. But the majority found that the natural import of the resort's cancellation—considering the Charlottesville context—was that the resort could have cancelled its contract with VDARE, not because of the mayor's statement, but "*after observing news coverage of th[e] Charlottesville event*." *See id.* (emphasis added). The majority, however, buried its head in the sand regarding key aspects of the mayor's statement: (i) he singled out the resort; (ii) in the next sentence, he referred to withholding resources from "this event" and referenced hate speech; and (iii) he invoked Colorado law protecting against "fear, intimidation, harassment and physical harm." *See id.* at 1164-66. What other "event" at the resort involving possible "hate speech" was the mayor's statement referring to if not to VDARE's event?

Judge Hartz dissented, arguing that the most (if not the only) reasonable construction of the mayor's statement that the city "will not provide any resources to this event" was that no police or fire resources would be provided for VDARE's event at the resort. *Id.* at 1175-76 (Hartz, J., dissenting). He argued that VDARE adequately alleged "[a] government effort to punish or deter disfavored speech" because, in context, the mayor's announcement that he was withholding

police services from the event was "an open invitation to those inclined to violence." *Id.* at 1176-77 (citing *Bantam Books*, 372 U.S. at 61-63); *see also id.* at 1177 (arguing that it was "more plausible that the Charlottesville violence enhanced the coercive force" of the mayor's statement "by highlighting the danger to the Resort from the denial of police protection").

VDARE dilutes the contextual inquiry largely followed by the lower courts and recasts *Bantam Books* prohibition of "informal censorship regimes" as a formalistic inquiry into whether government officials "formally" banned a speaker from expressing his or her views. *See id.* at 1167, 1172. And in so doing, the Tenth Circuit elevates form over function, precisely the opposite of what *Bantam Books* instructed courts to do. *See* 372 U.S. at 67.

2. In this case, the Second Circuit joined the Tenth Circuit in departing from the consensus approach. *See Vullo*, 49 F.4th 700. The NRA alleged, in part, that the powerful head of New York's DFS leveraged her regulatory authority to pressure financial institutions to cut ties with the NRA. *Id.* at 706-11.

Over several months, Vullo pledged to use her regulatory power to combat the availability of firearms, and she investigated technical violations of insurance firms providing services to the NRA, made back-alley threats to financial institutions to cease providing services for NRA-endorsed affinity-insurance programs, and issued formal guidance and a press release calling on financial institutions to sever their ties with the NRA. *Id.*; *see also* Pet.8-11. Feeling the heat, many of

these institutions complied and severed ties with the NRA. *Id.* at 706; *see also* Pet.11-12.

The Second Circuit considered whether Vullo's statements in the private meetings, guidance letters, press release, and consent decrees were "implied threats to employ coercive state power to stifle protected speech." *Vullo*, 49 F.4th at 714 (quoting *Hammerhead Enters., Inc.* v. *Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983)). So far, so good. But when flagging the factors courts consider in this inquiry—like word choice and tone, regulatory authority, perception of a threat—it characterized "whether the speech refers to adverse consequences" as the most important factor, effectively requiring the NRA to show an explicit threat. *See id.* at 715.

Like *VDARE*, *Vullo* applied a diluted version of *Bantam Books*' informal censorship inquiry, separately evaluating Vullo's statements in the press release, formal guidance, Lloyd's meeting, and consent decrees. *See id.* at 716-19. *First*, looking at the press release and guidance documents, it held that they were not threatening—even though the court conceded they could be perceived as such—because they didn't "refer to any pending investigations or possible regulatory action" (just the "reputational risks" of doing business with the NRA), and they "were written in an evenhanded, nonthreatening tone and employed words intended to persuade rather than intimidate." *See id.* at 717-18. But DFS, by phrasing its warning as one of "reputational risk," clearly communicated to regulated institutions that business relationships

with the NRA were off limits. Pet.11; *see also Gissel Packing*, 395 U.S. at 619 (regulated entities "pick up intended implications … more readily dismissed by a disinterested ear").[5]

Second, looking to the meetings and consent decrees, the court found that Vullo's alleged statement in the Lloyd's meeting—that she was more interested in Lloyd's ending its business relationship with the NRA than in pursuing its technical infractions—was made more (not less) reasonable by the existence of the investigation into affinity insurance violations. *See Vullo*, 49 F.4th at 718-19; *but see* Pet.22 (arguing that applying selective regulatory scrutiny to the NRA, a political adversary, made Vullo's speech more coercive).

Not only did the Second Circuit's analysis of Vullo's statements misapply *Bantam Books*, but it entirely disregarded the vast regulatory authority at her disposal. Unlike *Bantam Books*, *Okwedy*, *Backpage.com*, *R.C. Maxwell*, *American Family*, *and Penthouse*, Vullo possessed direct regulatory authority over the entities she allegedly threatened with regulatory scrutiny. Indeed, in *R.C. Maxwell*, the Third Circuit found no First Amendment violation, relying heavily on the city council's *absence* of direct regulatory authority. *See*

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[5] Vullo's warning is reminiscent of "the classic threat of B-movie mobsters: *Nice business you got there, it'd be a shame if something happened to it*." David B. Rivkin Jr. & Andrew M. Grossman, *The NRA vs. the Censorship 'Mob'*, THE WALL ST. J. (Dec. 27, 2022). Government officials shouldn't be able to evade First Amendment scrutiny so easily.

735 F.2d at 88 (explaining that "[t]he quantum of governmental authority brought to bear against [the target entity] was far less than that faced by Rhode Island's booksellers [in *Bantam Books*]"). The line between persuasion and coercion necessarily depends on context, and one critical contextual cue is whether government officials have regulatory authority over the entities or individuals they target. Turning a blind eye to Vullo's vast regulatory authority and formalistically relying on her "evenhanded" word choice and tone, *Vullo* casts aside its obligation to look to the substance and blesses government officials' talismanic invocation of certain words and phrases that would be perceived as threats by interested parties but "more readily dismissed by a disinterested ear." *See Gissel Packing*, 395 U.S. at 619.

Both *Vullo* and *VDARE* departed from the consensus approach described above, placing the Second and Tenth Circuits in a deep and irreconcilable conflict with the approach used in the Third, Fourth, Seventh, Eighth, Ninth, and D.C. Circuits. And in *Vullo*, the Second Circuit departed from its own prior circuit precedent. This split will not be resolved without this Court's review.

II. *Vullo*'s and *VDARE*'s expansion of the government speech doctrine risks eroding First Amendment safeguards for political speech.

Both *Vullo* and *VDARE* endorse a subtle expansion of the government speech doctrine that threatens to erode vital First Amendment protections for private

political speech. *See Matal*, 137 S. Ct. at 1758 (explaining that the doctrine "is susceptible to dangerous misuse" and calling for "great caution before extending [this Court's] government-speech precedents"). Shifting away from the standard inquiry for informal censorship claims—which considers whether, in context, a government official is regulating private expression, *see Bantam Books*, 372 U.S. at 66-67—*Vullo* and *VDARE* conceive of the government speech doctrine as a collision of "[t]wo sets of free speech rights … : those of private individuals and entities and those of government officials." *See Vullo*, 49 F.4th at 714-15; *VDARE*, 11 F.4th at 1156, 1168.

Critically, the "government-speech doctrine is not based on the view—which [this Court] ha[s] neither accepted nor rejected—that governmental entities have First Amendment rights." *Shurtleff*, 142 S. Ct. at 1599 (Alito, J., concurring in the judgment). Instead, it's based on the commonsense notion that government communications do not ordinarily "restrict the activities of … persons acting as private individuals." *Id.* (quoting *Rust* v. *Sullivan*, 500 U.S. 173, 198-99 (1991)). So, while it's undoubtedly true that the government is "exempt from First Amendment Scrutiny" when it "speak[s] for itself," *see Pleasant Grove City* v. *Summum*, 555 U.S. 460, 467 (2009), it isn't "exempt from First Amendment attack if it uses a means that restricts private expression," *Shurtleff*, 142 S. Ct. at 1599 (Alito, J., concurring in the judgment).

Even if government entities have First Amendment rights, this Court's government-speech cases provide little cover here. To qualify as "government speech," the relevant act of communication must be official government action. *See id.* at 1598 (citing *Clark* v. *Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984) and *Garcetti* v. *Ceballos*, 547 U.S. 410, 421 (2006)). And this Court's government-speech cases focus on whether a relevant act of communication was a government message or a private message. *See, e.g.*, *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015) (specialty license plates are government speech); *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005) (beef marketing is government speech); *Shurtleff*, 142 S. Ct. at 1593 (temporary flagpole use is private speech). Each case involved a single expressive conduit and concerned the speaker's identity (*i.e.*, government or private party).

But those cases are a poor fit for determining whether a government entity has regulated private expression through its own speech. *See VDARE*, 11 F.4th at 1176 (Hartz, J., dissenting) (explaining that government-speech doctrine is invoked to determine if government control over a forum regulates private speech or simply involves the government determining its own message). The "real question in government-speech cases," then, is "whether the government is *speaking* instead of regulating private expression." *Shurtleff*, 142 S. Ct. at 1595 (Alito, J., concurring in the judgment).

That's where *Vullo* and *VDARE* get off track. In *Vullo*, the court observed that "[t]wo sets of free speech rights are implicated," and when drawing the line between permissible government persuasion and impermissible coercion, it suggested that the most important factor for determining whether the government lost *its free speech rights* is whether it employed explicit threats in carrying out its duties. *Id.* at 714-15. Likewise, in *VDARE*, the court explained that "permissible government speech" means that officials are "entitled to speak for themselves [and] express their own views, including disfavoring certain points of view." 11 F.4th at 1168; *see also id.* (arguing that the mayor's speech was "itself protected" and had to "be egregious to be plausibly retaliatory"). So, rather than safeguarding private expression, both *Vullo* and *VDARE* subtly shift the emphasis to safeguarding government expression—leaving the door open for governments to use the "government-speech doctrine … as a cover for censorship." *Shurtleff*, 142 S. Ct. at 1595 (Alito, J., concurring in the judgment). But given the shaky foundation of a government's free speech rights, *see id.* at 1599, especially in light of established First Amendment protections for private speech, this Court should step in to shut that door and clarify the scope of the government-speech doctrine.

III. *Vullo* and *VDARE* pave the way for government suppression of disfavored speech.

Freedom of speech "is essential to free government," as our founding generation believed that "free and fearless reasoning and communication of ideas"

enables the "discover[y] and spread [of] political and economic truth." *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940). While the government may advocate for its preferred policy positions and criticize contrary positions, it may not use "the government-speech doctrine" to "surreptitiously engage[] in the 'regulation of private speech.'" *Shurtleff*, 142 S. Ct. at 1595-96 (Alito, J., concurring in the judgment) (quoting *Summum*, 555 U.S. at 467). But, in *Vullo* and *VDARE*, "[p]ublic officials have a readymade playbook for abusing their regulatory power to harm disfavored advocacy groups without triggering judicial scrutiny." ACLU Br. at 4.

In *Vullo*, that meant giving "government regulators free rein to selectively target unpopular speakers in the name of 'tak[ing] action to address key social and environmental issues.'" Pet.29 (citation omitted). In *VDARE*, like in *Backpage.com*, it meant pairing subtle threats with formal criticism of disfavored speech or conduct the official wants to eradicate. *See VDARE*, 11 F.4th at 1157, 1164-68; *see also Backpage.com*, 807 F.3d at 237-38 ("The judge was giving official coercion a free pass because it came clothed in what in the absence of any threatening language would have been a permissible attempt at mere persuasion.").

If the Second Circuit's decision is left standing, it's not difficult to imagine government officials employing similar tactics to stifle disfavored speakers.[6]

[6] Indeed, in recent years, government officials have increasing resorted to "jawboning"—which occurs when the "official threatens to use his or her power … to compel someone to take actions

Whether the method of choice is to target financial institutions that advocacy groups depend on to engage in fulsome political advocacy—whether related to school choice, abortion, religious liberty, or environmental issues—or simply to target private organizations that host events for such groups, the path forward is clearly marked. *Bantam Books*, *Backpage.com*, *Okwedy*, and *Blankenship* all recognized that government officials' reliance on subtle threats of coercive government action can stifle disfavored speakers. And if this Court doesn't intervene to shut down that path, "where would such official bullying end … ?" *Backpage.com*, 807 F.3d at 235.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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that the state official cannot"—in the social media sphere to "sway the decisions of private platforms and limit the publication of disfavored speech." *See* Will Duffield, *Jawboning Against Speech*, CATO POL'Y ANALYSIS, no. 934, Sept. 12, 2022, at 1-2. Jawboning speech intermediaries, like the financial institutions here, enables government officials to evade "the First Amendment's restrictions on government censorship." *Id* at 5-6 ("Using threats of prosecution or regulation to compel private speech suppression simply launders state censorship through private intermediaries.").

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