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

## Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Heller Foundation, America's Future, Citizens United, Citizens United Foundation, Public Advocate of the United States, Leadership Institute, Free Speech Coalition, Free Speech Defense and Education Fund, DownsizeDC.org, Downsize DC Foundation, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund in Support of Petitioner

RICK BOYER
INTEGRITY LAW FIRM
P.O. Box 10953
Lynchburg, VA 24506

JEREMIAH L. MORGAN*
WILLIAM J. OLSON
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
jmorgan@lawandfreedom.com
Attorneys for *Amici Curiae*

**Counsel of Record*
May 24, 2023

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Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Heller Foundation, America's Future, Citizens United, Citizens United Foundation, Public Advocate of the United States, Leadership Institute, Free Speech Coalition, Free Speech Defense and Education Fund, DownsizeDC.org, Downsize DC Foundation, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

## STATEMENT OF THE CASE

New York State's Department of Financial Services ("DFS") wields broad power over banks, insurance companies, and other financial institutions that operate within the State. DFS has authority to commence civil and criminal investigations and civil

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[1] It is hereby certified that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

enforcement actions, as well as to refer companies and individuals to the state's attorney general for criminal proceedings. Petition for Certiorari ("Pet. Cert.") at 8. From this position of power the head of DFS, Superintendent Maria Vullo, issued "Guidance Documents" in April of 2018, "encouraging" insurers doing business in New York to sever business relationships with Petitioner National Rifle Association ("NRA"). *Id.* at 10.

The Guidance Documents listed several groups that purportedly had already "'severed their ties with the NRA'" as examples of "'corporate social responsibility,'" and then warned regulated companies against the "'reputational risk'" of further "'dealings with the NRA'" given the "'social backlash'" against the group for its public support of the Second Amendment. *Id.* at 10. DFS "encourage[d]" regulated institutions to take "'prompt actions to manage'" this alleged "risk." *Id.*

A press release issued the same day by Superintendent Vullo and former New York Governor Andrew Cuomo "'urge[d] all insurance companies and banks doing business in New York to ... discontinue[] their arrangements with the NRA.'" *Id.* Governor Cuomo noted his directive to Vullo to move against the NRA and advised that the "risk" to companies in New York for doing business with the NRA was more than simply a "'matter of reputation.'" *Id.* at 10.

Vullo also held meetings with multiple insurance companies doing business with the NRA, threatening to use DFS enforcement power against them unless

they discontinued business with the NRA. *Id.* at 8-9. For example, Vullo all but promised to drop DFS's pursuit of "infractions" by the insurer Lloyds of London if the entity agreed to halt its dealings with the NRA. *NRA*, 49 F.4th 700, 718 (2d Cir. 2022). The NRA alleged that DFS's ability to impose sanctions, including "fines of hundreds of millions of dollars" and ensuing enforcement against NRA-affiliated businesses, caused multiple companies to agree to cease doing business with the NRA. Pet. Cert. at 11. The NRA further alleged that some of the companies privately admitted that it was the DFS threats that stopped them from doing business with the NRA. *Id.*

In May of 2018, the NRA filed suit against Vullo and Cuomo in the U.S. District Court for the Northern District of New York, alleging that DFS sought to punish the NRA for its protected speech in support of the Second Amendment. *Id.* at 12. On March 15, 2021, the district court partially granted motions to dismiss, finding that Vullo was entitled to absolute immunity on the NRA's claim that she had selectively enforced New York insurance laws — bringing proceedings against companies doing business with the NRA, while ignoring similar conduct by other companies. *NRA of Am. v. Cuomo*, 525 F. Supp. 3d 382, 400 (N.D.N.Y. 2021). The court also dismissed claims against Cuomo in his official capacity. *Id.* at 411.

However, the district court denied Vullo's motion to dismiss the NRA's First Amendment claim, which was premised on allegations that Defendants undertook enforcement actions in an effort to chill the

NRA's disfavored advocacy for the Second Amendment. *Id.* at 401. The district court found that, "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 ... a question of material fact exists as to whether she is entitled to qualified immunity under New York law." *Id.* at 403.

On appeal, the U.S. Court of Appeals for the Second Circuit reversed the denial of dismissal of the NRA's First Amendment claim against Vullo. *NRA*, 49 F.4th at 706. The Second Circuit focused on "government officials ... free speech" rights, alleging that Vullo's Guidance Documents were written "in an evenhanded, nonthreatening tone and employed words intended to persuade rather than intimidate." *Id.* at 717. Accordingly, the Second Circuit held that Vullo had not "cross[ed] the line between an attempt to convince and an attempt to coerce," and thus that the NRA had failed to allege facts sufficient to state a claim for a First Amendment violation. *Id.* at 717. The Second Circuit also held that, even if the NRA had plausibly alleged a First Amendment violation, Vullo was entitled to qualified immunity because the violation was not so clearly established that a reasonable official ought to have known that the conduct was constitutionally impermissible. *Id.* at 717, 719.

The Second Circuit remanded the case to the district court with instructions to enter judgment for Vullo. *Id.* at 706.

## SUMMARY OF ARGUMENT

While almost half of Americans report living in a home with a firearm,[2] New York believes that guns are so terrifying that allowing banks and insurance companies to service gun advocacy groups will cause "reputational risk" that can and must be avoided. The truth is likely to be quite different. Most customers and investors will have less respect for a bank or insurance company that caves to pressure from politicized regulators as they realize that, when every business decision is politicized, they could be the next patrons to be barred. The Second Circuit opinion evidenced hostility to rights protected by the Second Amendment and was willing to allow New York to hide behind this "reputational risk" rationale even though it was once used (unsuccessfully) by segregationists to justify refusing service to black patrons at restaurants and hotels.

The New York Department of Financial Services is not an outlier, as the practice revealed here is reminiscent of how government at all levels has long been weaponized to oppose politically disfavored individuals and groups. Since both major political parties have committed these abuses, every American has a stake in rising up to protect those with differing views.

Two constitutional rights are at stake here. New York has acted to deprive Petitioner of its First

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[2] *See* L. Saad, "What Percentage of Americans Own Guns?" *Gallup* (Nov. 13, 2020).

Amendment rights for the very reason that Petitioner's advocacy is in support of Second Amendment rights. This violates this Court's view that the exercise of one constitutional right cannot result in a waiver or infringement of another constitutional right.

If New York is allowed to prevent gun advocacy groups from functioning, what is to prevent Texas and other pro-life states from imposing the same agenda against Planned Parenthood? There must be only one rule for advocacy groups in the nation, and that is — regulators may not abuse their government powers to silence their political opponents.

## ARGUMENT

### I. THIS COURT SHOULD GRANT CERTIORARI TO REJECT THE SECOND CIRCUIT'S USE OF SEGREGATION-ERA JUSTIFICATIONS FOR NEW YORK'S TARGETING OF POLITICALLY DISFAVORED GROUPS.

The Second Circuit's rationale below for using the force of government to target and squelch disfavored First Amendment speech about disfavored Second Amendment rights evinces an open hostility to both of the critical constitutional rights at issue. Justifying such coercion based on the "reputational risk" to regulated companies relies on rejected segregationist arguments employed against civil rights from a dark chapter of this country's past.

### A. The Panel's Open Hostility to Gun Rights Was on Full Display.

The lower court's disdain for the basic Second Amendment right to keep and bear arms in self-defense could not be more thinly veiled, as evidenced in the panel's decision below. In its opinion, the Second Circuit repeatedly and negatively juxtaposed the Second Amendment advocacy of "gun promotion organizations" like the NRA with the Parkland, Florida school shooting (*NRA*, 49 F.4th at 706, 708-09, 717), as if advocacy for the right to keep and bear arms equates to support of criminal violence. The court's opinion claimed repeatedly that "[t]he general backlash against gun promotion groups and businesses that associated with them was intense after the Parkland shooting. It continues today." *Id.* at 717. The lower court could not find a single positive thing to say about firearms or firearms advocacy, and omitted any reference to the right to keep and bear arms.

Ninth Circuit Judge VanDyke's words in a recent dissent aptly characterize such treatment of the Second Amendment:

> The reason I think most of my colleagues ... would genuinely struggle more with a car ban than they do with a gun ban is that they naturally see the value in cars. They drive cars. So they are willing to accept some inevitable amount of misuse of cars by others. And my colleagues similarly have no problem protecting speech — even worthless,

> obnoxious, and hateful speech — because they like and value speech generally. After all, they made their careers from exercising their own speech rights. On the other hand, as clearly demonstrated by this case, most of my colleagues see "limited lawful" value in most things firearm-related.
>
> But the protections our founders enshrined in the Bill of Rights were put there precisely because they worried our future leaders might not sufficiently value them. [*Duncan v. Bonta*, 19 F.4th 1087, 1164 (9th Cir. 2021) (VanDyke, J., dissenting), *rev'd. and remanded* by *Duncan v. Bonta*, 142 S. Ct. 2895 (2022).]

Despite the panel's "not sufficiently valu[ing]" Second Amendment rights, and its making every effort to justify New York's blatant attacks, "[t]he constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2156 (2022). And regardless of the Second Circuit's farcical connection between nonprofit advocacy for constitutionally enumerated rights and the commission of violent criminal acts, "[t]he right to keep and bear arms ... is not the only constitutional right that has controversial public safety implications." *McDonald v. Chicago*, 561 U.S. 742, 783 (2010).

### B. Segregationists Used Reputational Risk to Businesses as a Primary Argument against the 1964 Civil Rights Act.

In finding that Superintendent Vullo's actions do not constitute a First Amendment violation of the NRA's pro-Second Amendment speech,[3] the Second Circuit, knowingly or not, recycles from the dustbin of history the arguments used by segregationists to attack the Civil Rights Act in 1964.[4]

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[3] The Petition painstakingly details the Second Circuit's mental gymnastics used to reach its ultimate conclusion. Pet. Cert. at 17-28. Indeed, the court below openly admitted that Superintendent Vullo's actions were part of her office's pre-planned "'campaign against gun groups'" and her personal scheme to "'leverage [her] powers to combat the availability of firearms'" by, among other things, convincing "banks and insurance companies" to "discontinu[e] their relationships with gun promotion organizations." *NRA*, 49 F.4th at 706, 708. Likewise, the court below freely acknowledged that Vullo promised not to prosecute various offenses (that her office had trumped up ahead of time against the NRA's insurers), on the condition that the insurers "'ceased providing insurance to gun groups, especially the NRA.'" *Id.* at 718. To be sure, the court admitted that this was "a closer call." *Id.* Finally, the lower court readily conceded that Vullo's tactics could reasonably have been perceived as direct threats by the financial industry and, in fact, that these undisguised efforts by Vullo and her office yielded **precisely** the results intended, where "multiple entities indeed severed their ties or determined not to do business with the NRA." *Id.* at 706. Yet according to the court, this somehow did "not cross the line between an attempt to convince and an attempt to coerce." *Id.* at 717.

[4] This is not the first time New York officials have dusted off such arguments in order to justify the state's attacks on Second Amendment rights. *See Antonyuk v. Bruen*, No. 1:22-cv-00734, N.D.N.Y., Plaintiffs' Reply to Defendant's Opposition to Plaintiffs'

When this Court began to apply the Civil Rights Act to dismantle institutionalized segregation, a common refrain of segregationists was that forcing white-owned businesses to accommodate black patrons would inflict financial and property risk on the white businesses. In 1964, for example, the Court decided the twin cases of *Katzenbach v. McClung*, 379 U.S. 294 (1964) and *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), the former holding that the Civil Rights Act could compel white-owned businesses to serve black patrons, and the latter holding the same with respect to hotels.

*Katzenbach* overturned a lower court decision striking down the 1964 Civil Rights Act, which had found "that if [the restaurant] were required to serve Negroes it would lose a substantial amount of business." *Katzenbach* at 297. Indeed, that lower court had adopted arguments nearly identical to those of the Second Circuit below, finding that the restaurant owners "have shown by evidence, that these requirements of title II will cause substantial and irreparable injury to their business. Thus, the substance of the allegations and proof is that the provisions of title II and the duty it imposes constitute a present injurious impingement upon the plaintiffs' property rights." *McClung v. Katzenbach,* 233 F.

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Motion for a Preliminary Injunction (Aug. 22, 2022) at 16-21 (summarizing the racist underpinnings of New York's "good moral character" requirement as having arisen in the Nation's early immigration laws, various states' slave codes, and Florida licensing officials' oppression of blacks and Italians in the early 1900s).

Supp. 815, 819 (N.D. Ala. 1964). Accordingly, the lower court upheld the restaurant's ability to bar black customers, reasoning that a rule allowing black customers would harm the business and the economy.

These same arguments were repeated in Congress. In debates on the Civil Rights Act, Rep. Albert Watson questioned "[w]hat happens to the innumerable establishments throughout the South such as public theaters, restaurants, and county fairs which will lose business as soon as integration occurs.... The motion picture theater in a small southern town will lose business because white parents will refuse to send their children."[5] Likewise, in testimony before the Senate Commerce Committee, segregationist motel owner Samuel Setta testified, "it is ... immoral to enact laws which will legislate a man into bankruptcy… [I]n my motel if customers want TV, I provide TV.… And if they prefer a segregated motel, I provide a segregated motel.... The Negro is rejected because he is an economic liability to our businesses."[6]

As the case awaited Supreme Court action, *Life* magazine ran a sympathetic article on Ollie McClung,

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[5] *See Civil Rights: Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before the H. Comm. on the Judiciary*, 88th Cong. 1713-1714 (1963) (statement of Rep. Albert W. Watson, South Carolina).

[6] *Civil Rights—Public Accommodations: Hearing on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 586-588 (1963) (statement of Samuel J. Setta, Chairman, Referendum Committee of Maryland).

the white restaurant owner who would only serve black patrons on a take-out basis:

> The civil rights law had posed a dilemma for Ollie. He believes in obeying all laws. On the other hand, he was sure that compliance with this one would wreck his business. Over the years a Negro neighborhood had grown up around the restaurant. He could foresee that once he desegregated, the place would become overrun with Negro teen-agers. His regular customers would stay away. [M. Durham, "Ollie McClung's Big Decision," *Life* at 31 (Oct. 9, 1964).]

The Second Circuit was willing to accept a nearly indistinguishable argument from Vullo, noting that her "guidance letters" instructed "DFS-regulated entities to consider what they could do to reduce ... the **reputational risks** of doing business with gun promotion groups." *NRA*, 49 F.4th at 715 (emphasis added). But, just as with the arguments used by segregationists of the past, Vullo's "concern" for business solvency is the thinnest of veneers for her "desire to leverage [her] powers to combat the availability of firearms." *Id.* at 708.

### C. The Second Circuit Allows Government to Assume and Even Create Economic Risk to Punish Disfavored Businesses for Disfavored Speech.

As the panel below noted, Superintendent Vullo "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.... Thereafter, multiple entities indeed severed their ties or determined not to do business with the NRA." *NRA*, 49 F.4th at 706. Similarly, the 2018 press release by former Governor Cuomo reported that "DFS is encouraging **regulated entities** to **consider reputational risk** and promote corporate responsibility in an effort to encourage strong markets and **protect consumers**." DFS Press Release (Apr. 19, 2018) (emphasis added).[7]

Consideration of "reputational risk" is appropriate, but it cannot be used as cover for launching political attacks on opposing views. The State of New York is still under the authority of the U.S. Constitution. As the Federal Reserve notes, "[r]eputational risk is the

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[7] New York tightly regulates insurance companies, and penalizes excess "reputational risk." State law provides, "Pursuant to Insurance Law sections 1503(b), 1604(b), and 1717(b), an entity shall adopt a formal enterprise risk management function that identifies, assesses, monitors, and manages enterprise risk." 11 N.Y. Comp. Codes R. & Regs. § 82.2. It requires insurance companies to "address all reasonably foreseeable and relevant material risks including, as applicable, ... reputational ... and any other significant risks...." *Id.* As Petitioner notes, "risk-management deficiencies can result in regulatory action, including fines of hundreds of millions of dollars." Pet. Cert. at 11. Thus, a warning from a government official has a massive chilling effect on the conduct or speech that is the subject of the warning.

potential that negative publicity regarding an institution's business practices, whether true or not, will cause a decline in the customer base, costly litigation, or revenue reductions." Federal Reserve, "Supervisory Policy and Guidance Topics." Likewise, as the Society of Actuaries notes, "[f]or insurance companies a positive reputation is not just a factor for their financial success but a necessary factor to survive in the market" for insurance companies as well. S. Kamiya, J. Schmit & M. Rosenberg, "Determinants of Insurers' Reputational Risk," *Society of Actuaries* (Aug. 2010). Accordingly, "regulators restrict insurers' performance such as excessive risk-taking in investment and inappropriate underwriting practices." *Id*. Until now, the exercise of a constitutional right had not been deemed so dangerous to reputation that it could be banned.

There is little difference between New York allegedly protecting consumers against nonprofit advocacy groups who defend constitutional rights, and Samuel Setta who allegedly was protecting white consumers by prohibiting blacks from staying at his motels. In sanctioning this justification, the Second Circuit has simply modernized and sanitized the argument rejected in *Katzenbach*, preventing the government from threatening private businesses into imposing economic costs that infringe on the civil rights of others — infringements that the government could never impose directly.

## II. THE HISTORY OF DESTRUCTION OF CIVIL RIGHTS BY BUREAUCRATS COUNSELS AGAINST ACCEPTING THE SECOND CIRCUIT'S FLAWED HOLDING.

This country's history records lesson after sobering lesson of government regulators at all levels of government weaponizing their authority to destroy political opponents. Generally, as with Superintendent Vullo's "gun safety" and "corporate responsibility" smokescreen, such targeting of the enemies of the incumbent political authorities has been couched in terms of public service.

### A. The Federal Bureau of Investigation.

The FBI, for example, has received renewed criticism for engaging in numerous highly politicized activities detailed in the Durham Report.[8] Before that, its raid on former President Trump's Florida home, while ignoring classified documents taken by Vice President Biden are unexplained. The FBI's discriminatory enforcement actions against protesters at abortion clinics (including a SWAT team raid with guns drawn[9] at the home of a pro-life activist who was later acquitted of federal charges for allegedly shoving

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[8] Special Counsel John H. Durham, "Report on Matters Related to Intelligence Activities and Investigations Arising Out of the 2016 Presidential Campaigns," (May 12, 2023).

[9] D. Glebova, "Pro-Life Activist Arrested After SWAT Team Raids Home with Guns Drawn in Front of 'Screaming' Children," *National Review* (Sept. 24, 2022).

a pro-abortion zealot[10]). Meanwhile, the Bureau has all but turned a blind eye to vandalism and attacks on pro-life crisis pregnancy centers.[11]

Recently, the House Judiciary Committee released a scathing 1,050-page report in which "[w]histleblowers describe how the FBI has abused its law-enforcement authorities for political purposes, and how actions by FBI leadership show a political bias against conservatives."[12] Likewise, the recent release of the "Twitter Files" has revealed that under the Biden Administration, the "FBI paid Twitter nearly $3.5 million of taxpayer cash to ban accounts largely linked to conservative voices."[13] Worse still, investigative journalist Lee Fang at *The Intercept* has revealed a "censorship portal" via which the FBI had access to the systems at social media giants such as Facebook and Twitter, used to "flag" speech critical of the administration as "misinformation" to be

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[10] B. Bernstein, "Pro-Life Activist Arrested by FBI Acquitted on Federal Charges," *National Review* (Jan. 30, 2023).

[11] A. Hagstrom, "AG Garland claims FBI has put 'full resources' into tracking attacks on pro-life centers, despite few arrests," *FoxNews* (Mar. 1, 2023).

[12] "FBI whistleblowers: What their disclosures indicate about the politicization of the FBI and Justice Department," Republican Staff Report Committee on the Judiciary, U.S. House of Representatives (Nov. 4, 2022).

[13] V. Nava, "FBI paid Twitter $3.4M for doing its dirty work on users, damning email shows," *New York Post* (Dec. 19, 2022).

suppressed or removed entirely from the social media outlets.[14]

Of course, while these examples of FBI politicization are in most recent memory, they are far from the only examples. Indeed, perhaps the FBI's most infamous moment occurred when Acting Director L. Patrick Gray burned files containing information relating to the Nixon Administration's burglary of Democratic headquarters at the Watergate Hotel.[15] In 1975, the Senate's "Church Committee" discovered that the FBI had schemed to blackmail Dr. Martin Luther King, Jr., which many viewed as an effort to push him to commit suicide. Sen. Walter Mondale stated at the time that, "apart from direct physical violence and apart from illegal incarceration, there is nothing in this case that distinguishes that particular action much from what the KGB does with dissenters in [the Soviet Union]."[16]

In the 1930s, President Roosevelt issued a secret directive "authorizing" the FBI to wiretap Americans without warrants, despite both federal law and Supreme Court decisions barring such action.[17] If any

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[14] https://twitter.com/lhfang/status/1587104660355096576

[15] "The Nation: New Shocks--and More to Come," *Time* (May 7, 1973).

[16] F.J. Smist, Jr., CONGRESS OVERSEES THE U.S. INTELLIGENCE COMMUNITY at 75-76 (2d ed. 1994).

[17] M. Cecil, Hoover's FBI and the Fourth Estate: The Campaign to Control the Press and the Bureau's Image, at 88 (Univ. Press

press dared to criticize the FBI, Hoover simply removed unfriendly media voices from the FBI mailing list, ensuring that only press outlets friendly to the administration would be heard by the public.[18]

### B. The Internal Revenue Service.

Along with the FBI, the IRS has been a longtime weapon used against political opponents of the party in power. For example, in 2013, a firestorm erupted after President Barack Obama's Internal Revenue Service Director of Exempt Organizations, Lois Lerner, was caught targeting "Tea Party" groups for denial of nonprofit status based on their disfavored political beliefs.[19] Half a decade later, under Donald Trump, the IRS settled a lawsuit by Tea Party groups for $3.5 million, even though Lerner's supporters continued to insist she was simply targeting improper political activity and enforcing the law.[20]

But as with the FBI, IRS abuses to target an administration's political enemies go back a half-century and engulf both parties. Elliot Roosevelt, son of President Franklin Roosevelt, candidly stated "[m]y father may have been the originator of the concept of

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of Kansas: 2014).

[18] *Id*.

[19] M.D. Kittle, "Conservative Groups Targeted in Lois Lerner's IRS Scandal Receive Settlement Checks," *The Daily Signal* (Jan. 11, 2019).

[20] R. Bade, "Lerner speaks," *Politico* (Sept. 22, 2014).

employing the IRS as a weapon of political retribution."[21] Indeed, "President Roosevelt used the IRS against a host of political rivals and business opponents," including congressmen, union leaders, and unsupportive publishers.[22]

President Kennedy later continued the tradition, using the IRS to target certain fundamentalist Christians who had opposed his election as the first Catholic President, and "establish[ing] an 'Ideological Organizations Audit project' within the IRS, which targeted conservative groups ... several of which lost their tax-exempt status, jeopardizing their fundraising."[23]

A decade later, Richard Nixon turned the tables, unleashing the IRS on liberal interests, including potential 1972 Democratic opponents, civil rights groups, and unfriendly reporters. The article of impeachment passed by the House cited Nixon's efforts to use the IRS to obtain, "in violation of the constitutional rights of citizens, confidential information contained in income tax returns for

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[21] B. Folsom, Jr., New Deal or Raw Deal at 147 (Threshold Edt.: 2008).

[22] G. Chaddock, "Playing the IRS Card: Six Presidents who Used the IRS to Bash Political Foes: 2. President Franklin Roosevelt," *Christian Science Monitor* (May 17, 2013).

[23] G. Chaddock, "3. President John Kennedy," *Christian Science Monitor* (May 17, 2013).

purposes not authorized by law."[24] In choosing a new IRS commissioner in 1971, Nixon had a simple job description: "I want to be sure he is a ruthless son of a [b....], that he will do what he's told, that every income tax return I want to see I see, that he will go after our enemies and not go after our friends."[25] After Nixon aide John Dean gave an "enemies list" to IRS Commissioner Johnnie Walters and demanded the IRS pursue Nixon's opponents, Walters first buried the list instead of pursuing it, and then resigned. But Nixon pressed on: "[t]he IRS must be used even if we've got to kick Walters' [a..] out first and get a man down there," he said.[26]

### C. The Federal Communications Commission.

Federal licensing agencies have also long been used to punish political opponents, just as Superintendent Vullo is now using the New York DFS. Administrations of both parties have used radio and television broadcast licensing as a way to stamp out opposition. For example, "Franklin Roosevelt thought it eminently fair to forbid all newspaper publishers to own radio stations … on the ground that they were, as

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[24] G. Chaddock, "4. President Richard Nixon," *Christian Science Monitor* (May 17, 2013).

[25] C. Edwards, "Nixon and the IRS," *Cato Institute* (June 27, 2014).

[26] L. Riddle, "Johnnie Mac Walters known for courage in Watergate crisis," *Greenville News* (June 25, 2014).

a class, unfairly hostile to the New Deal."[27] Under President Nixon, "[l]icense harassment of stations considered unfriendly to the administration became a regular item on the agenda at White House policy meetings...." *Id*.

In 1949, the FCC outlined the "Fairness Doctrine," advertised as a way to ensure "'coverage of vitally important controversial issues of interest to the community … and … a reasonable opportunity for the presentation of contrasting viewpoints on such issues.'" *Id*. at 103. But the aspiration of "fairness" quickly turned to a reality of censorship and punishment of political opponents.

As Kennedy's Assistant Secretary of Commerce, Bill Ruder, later admitted, "'[o]ur massive strategy was to use the Fairness Doctrine to challenge and harass right-wing broadcasters and hope that the challenges would be so costly to them that they would be inhibited and decide it was too expensive to continue.'" Hazlett at 112. Thus, as Professor Thomas Hazlett concluded, "the real goal was not enhanced public debate of important issues, but the silencing of opposition speakers." *Id*.

As Justice Douglas correctly observed in 1973, "the regime of federal supervision under the Fairness Doctrine is contrary to our constitutional mandate and makes the broadcast licensee an easy victim of political pressures and reduces him to a timid and submissive

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[27] T. Hazlett, "The Fairness Doctrine and the First Amendment," *The Public Interest* at 103, 105 (Summer 1989).

segment of the press whose measure of the public interest will now be echoes of the dominant political voice that emerges after every election." *Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 164 (1973) (Douglas, J., concurring in judgment). Justice Douglas' words ring especially true here, where Vullo and DFS are transparently attempting to use state regulatory power to punish dissenting political speakers to eliminate speech that the State of New York would prefer Americans not hear.

## III. SECOND AMENDMENT ADVOCACY MUST NOT BE ALLOWED TO TRIGGER A LOSS OF FIRST AMENDMENT RIGHTS.

Although this is a First Amendment case, this Court should be particularly sensitive to the fact that the First Amendment is not the only constitutional right at stake. As Petitioner argues, it is unconstitutional for government officials to threaten "financial institutions ... with regulatory sanctions if they do business with a group whose **views are disfavored** by government officials." Pet. Cert. at 30 (emphasis added). Here, those disfavored views involve advocacy to protect and preserve the enumerated constitutional right to keep and bear arms. As the petition states, "Vullo selectively targeted the NRA **because of the** NRA's **Second Amendment** advocacy." *Id*. at 9 (emphasis added).

Authorizing the targeting of disfavored constitutional rights, the Second Circuit ignored the fact that its decision implicates the axiom that a

citizen cannot be required to surrender one constitutional right (here, the First Amendment) for exercising another (here, the Second Amendment).

This principle has been upheld in similar contexts and certainly is applicable here. In *Simmons v. United States*, 390 U.S. 377 (1968), to assert a Fourth Amendment violation, a criminal defendant was required to testify that an object belonged to him, and that admission was later used against him at trial. Thus, he was forced to surrender his Fifth Amendment right against self-incrimination in order to assert his Fourth Amendment right. This Court noted that "this Court has always been peculiarly sensitive" to such constitutional deprivations, prohibiting such a Catch-22, holding that it is "**intolerable that one constitutional right should have to be surrendered in order to assert another**." *Id.* at 393-94 (emphasis added). Similarly, in *Perry v. Sindermann*, 408 U.S. 593 (1972), this Court ruled that government may not deny a person a benefit "on a basis that infringes his constitutionally protected interests.... For if the government could deny a benefit to a person because of his constitutionally protected [rights], his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' ... Such interference with constitutional rights is impermissible." *Id.* at 597.

Yet that is precisely what Superintendent Vullo has done here, "penaliz[ing] and inhibit[ing]" Second Amendment advocacy by threatening and extorting the private sector to cause damage to nonprofit advocacy

groups that she never would have been able to cause directly. By disrupting Petitioner's First Amendment right to speak, Vullo seeks to implement her "'views on gun control.'" *NRA*, 49 F.4th at 708.

Particularly after *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald*, and more recently *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. ___, 142 S. Ct. 2111 (2022), the government may not silence (or coerce others to silence) Petitioner's advocacy in favor of the Second Amendment right to keep and bear arms — no matter the political views of the New York regulators.

## IV. THE SECOND CIRCUIT'S DECISION OPENS THE FLOODGATES FOR INCUMBENT REGULATORS TO PUNISH DISFAVORED SPEECH ON OPPOSING SIDES OF THE DEBATE.

The Second Circuit's decision below is shortsighted, failing to consider how its ruling could be applied across the country by weaponized regulatory bodies in other states. For example, with little or no ostensible First Amendment protections to stop them, regulators in conservative states could apply the Second Circuit's tortured logic to exact **their own** social and political justice against disfavored advocacy organizations on the other side of the political aisle.

For example, drawing inspiration from recent headlines, Missouri regulators could make a corporate pariah of Anheuser-Busch for its recent pro-LGBT marketing practices, strongly suggesting (threatening)

that "best business practices" and "corporate social responsibility" counsel against supporting such a radical agenda.[28] Indeed, what people view as positive social activism in one state may draw ire as a social ill in another. Presiding over the traditionally left-leaning states of New York, Vermont, and Connecticut, the Second Circuit apparently did not stop to consider the risks its decision poses to left-leaning groups who advocate their causes in conservative states. For example, the highly publicized corporate donors to "Black Lives Matter," and the organization's alleged misuse of funds, would seem to be more than enough of a "jurisdictional hook" for weaponized state regulators to engage in regulatory harassment at least on the level of what Superintendent Vullo has done to Petitioner.[29]

The regulatory weaponization that the Second Circuit's decision invites and sanctions is more than a mere speculative risk. Following this Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), many states have sought to clamp down on the practice, but not advocacy groups and proponents.[30] On its face, the Second Circuit's decision would invite these states to engage in a regulatory

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[28] *See* K. Brooks, "Bud Light Gets Stock Downgrade Just Weeks After Dylan Mulvaney Fallout," *CBS News* (May 12, 2023).

[29] *See, e.g.*, J. Wellemeyer, "Want to Know Where All Those Corporate Donations for #BLM Are Going? Here's the List," *NBC News* (June 5, 2020).

[30] *See, e.g.*, "Texas Abortion 'Trigger' Law Effective August 25th, 2022," Tex. State L. Libr. (July 27, 2022).

crackdown on groups such as Planned Parenthood (and its various state chapters and affiliates) through, for example, interfering with access to banking services, accomplished by threatening or imposing significant monetary penalties following increased regulatory scrutiny.

Robust First Amendment protections exist for many reasons — including keeping bureaucrats of all stripes from abusing their regulatory powers to target their political opponents.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

RICK BOYER
INTEGRITY LAW FIRM
P.O. Box 10953
Lynchburg, VA 24506

JEREMIAH L. MORGAN*
WILLIAM J. OLSON
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
jmorgan@lawandfreedom.com

Attorneys for *Amici Curiae*

**Counsel of Record*
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