No. 22-842

In The
Supreme Court of the United States

THE NATIONAL RIFLE ASSOCIATION OF AMERICA,

Petitioner,

v.

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

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF

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QUESTIONS PRESENTED

1. Does the First Amendment allow a government regulator to threaten regulated entities with adverse regulatory actions if they do business with a controversial speaker, as a consequence of (a) the government's own hostility to the speaker's viewpoint or (b) a perceived "general backlash" against the speaker's advocacy?

2. Does such coercion violate a clearly established First Amendment right?

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REPLY

"At a time when free speech is under attack," *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2302-03 (2019) (Alito, J., concurring), the Second Circuit's decision below contradicts a key First Amendment precedent, *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963), and creates a near-impossible hurdle for plaintiffs challenging powerful regulators' viewpoint-based attempts to suppress political advocacy.

I. The Second Circuit's Qualified Immunity Holding Eviscerates Past Precedent and Gives Free Rein to Regulators to Blacklist Their Political Adversaries

Until the Second Circuit's ruling below, the law was clear that Superintendent Vullo's attempt to use her regulatory power to blacklist the National Rifle Association of America due to its protected speech was forbidden by the First Amendment. The Second Circuit's opinion below upends established law and in effect limits *Bantam Books*, *Okwedy* v. *Molinari*, 333 F.3d 339, 344 (2d Cir. 2003), and *Rattner* v. *Netburn*, 930 F.2d 204 (2d Cir. 1991), to their precise facts.

The Second Circuit's qualified immunity holding is derivative of its merits analysis. It hinges on a single conclusory sentence: "Here, the various cases addressing the issue did not provide clear and particularized guidance but involved very different circumstances and much stronger conduct." (App. 34.) But it is clearly established that "a public-official defendant

who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant's direct regulatory or decisionmaking authority over the plaintiff, or in some less-direct form." *Okwedy*, 333 F.3d at 344. That is exactly what the NRA's Complaint pleads. Since this case falls squarely within the rule established by *Bantam Books*, *Okwedy*, and *Rattner*, there is a violation of clearly-established law.

Bantam Books involved the Rhode Island Commission to Encourage Morality in Youth, which had no direct regulatory power. *Bantam Books, Inc.*, 372 U.S. at 66. A target "was 'free' to ignore the Commission's notices" and the target's "refusal to 'cooperate' would have violated no law." *Id*. at 68. Nonetheless, *Bantam Books* found that the Commission's notices violated the First Amendment. *Bantam Books, Inc*., 372 U.S. at 66.

By contrast, Vullo had sweeping regulatory power over the target entities, directly threatened the NRA's insurance providers with adverse regulatory action, and followed up by imposing multi-million-dollar fines on the NRA's insurance partners and requiring that they cease underwriting, managing, or selling affinity insurance programs for the NRA in perpetuity. (App. 199-200, 214, 218.) Vullo proposes that *Bantam Books* only applies to "a commission established specifically to investigate" First Amendment-protected activity, and not a "long established state agency" like New York's Department of Financial Services ("DFS").

(Opp. 17.) But such a distinction has no basis in law or logic.

In *Okwedy*, the Second Circuit considered a letter from Staten Island's Borough President, Guy Molinari. Molinari sought to "establish a dialogue" with a company that placed "unnecessarily confrontational and offensive" billboards. *Okwedy*, 333 F.3d at 341. Although Molinari lacked any regulatory over the company, he appealed to it "as a responsible member of the business community to please contact" his "legal counsel and Chair of my Anti-Bias Task Force to discuss further the issues I have raised in this letter." *Id*. at 342-43 (cleaned up). Finding that the complaint stated a First Amendment violation, the Second Circuit rejected the district court's analysis "that Molinari's letter is not reasonably susceptible to interpretation as threatening economic harm, and that because the letter called for a dialogue it is not the type of inquiry that could reasonably be viewed as designed to intimidate." *Id*. at 344 (cleaned up).

The analysis that *Okwedy* rejected is indistinguishable from the Second Circuit's reasoning below. Analyzing Vullo's Guidance Documents and Press Release in isolation from her backroom threats and selective enforcement actions targeted at the NRA, the Second Circuit concludes that "the Guidance Letters and Press Release were written in an even-handed, nonthreatening tone and employed words intended to persuade rather than intimidate." (App. 28-29.) But that analysis contains the same errors condemned in *Okwedy*: "Because the district court was considering a

motion to dismiss, it should have viewed [Vullo's conduct] in the light most favorable to plaintiffs." 333 F.3d at 344. Tellingly, Vullo offers no meaningful distinction between this case and *Okwedy*, invoking merely "the particular characteristics and context of the letter" in *Okwedy*. (Opp. 19.)

In *Rattner*, the Second Circuit considered a letter from a village administrator (Netburn) raising "significant questions and concerns" about an advertisement in a Chamber of Commerce-published newsletter. 930 F.2d at 206. Despite Netburn's lack of regulatory authority, the Second Circuit rejected the district court's determination that "[i]n the absence of language intimating legal reprisal, the plaintiff's claim of governmental coercion must fall." *Id*. at 209. "The district court's ruling that the language of the Netburn letter, either standing alone or in all the circumstances, is not a veiled threat of boycott or reprisal does not view that language in the light most favorable to Rattner as the nonmoving party." *Id*. at 210.

Moreover, Vullo ignores the most basic similarity between this case, *Bantam Books*, *Okwedy*, and *Rattner*: in each case, the regulatory threats worked. *Bantam Books*, 372 U.S. at 67; *Okwedy*, 333 F.3d at 344; *Rattner*, 930 F.2d at 210; App. 227-29. As in *Bantam Books* and *Rattner*, in this case there is direct evidence that the targets perceived the government official's communication as threatening. The NRA was dropped by its longtime corporate insurance carrier after Vullo's threats. In seeking to obtain replacement coverage, "[t]he NRA has spoken to numerous carriers"

and "nearly every carrier has indicated that it fears transacting with the NRA specifically in light of DFS's actions against Lockton, Chubb, and Lloyd's." (App. 228.) Further, in February 2018, the Chairman of the NRA's longtime business partner, Lockton, placed a distraught phone call to the NRA. (App. 209.) Although Lockton wished to continue doing business with the NRA, he said it would need to "drop" the NRA for fear of "losing [our] license" to do business in New York. (*Id*.). Similarly, board minutes obtained from Lloyd's show its understanding that Vullo's actions had transformed "had transformed the 'gun issue' into a compliance matter" and that it had no choice but to cut ties with the NRA. (S. App. 29.)

Two other cases cited by Vullo, *X-Men Sec., Inc.* v. *Pataki*, 196 F.3d 56 (2d Cir. 1999) and *Hammerhead Enters.* v. *Brezenoff*, 707 F.2d 33 (2d Cir. 1983), are consistent with the clearly-established rule. Indeed, *Rattner* distinguished *Hammerhead Enterprises* on grounds that also distinguish this case from *Hammerhead*: that the *Hammerhead* defendant completely lacked regulatory authority, and his letter had no effect whatsoever on its recipients. *See Rattner*, 930 F.2d at 210. Similarly, *X-Men Sec*. involved a lawsuit against legislators who lacked "any power or authority" to decide, or even "shape or supervise," the government-contracting process that was the site of the alleged retaliation. 196 F.3d at 71, 68.

Vullo suggests that the Court would not be able to reach the merits of the NRA's First Amendment claim "as long as the qualified immunity holding remains."

(Opp. 9.) That is incorrect. The Court has broad discretion "in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson* v. *Callahan*, 555 U.S. 223, 236 (2009). Thus, the Court may address the merits of a lower court's constitutional ruling even at the behest of an official who *prevailed* on qualified immunity. "No mere dictum, a constitutional ruling preparatory to a grant of immunity creates law that governs the official's behavior." *Camreta* v. *Greene*, 563 U.S. 692, 708 (2011). And the Court may review a constitutional merits holding and find a constitutional violation, even while also concluding that the officers in question are protected by qualified immunity. *Safford Unified Sch. Dist. No. 1* v. *Redding*, 557 U.S. 364, 377-79 (2009).

II. The Second Circuit's Decision Conflicts With *Backpage.com*, Creating a Circuit Split

Vullo makes little effort to reconcile the Second Circuit's decision below with *Backpage.com, LLC* v. *Dart*, 807 F.3d 229 (7th Cir. 2015). She notes that *Backpage.com* involved a "targeted letter" (Opp. 18), but this case involves backroom threats from Vullo directed at the NRA's insurance partners. She notes that the letter in *Backpage.com* used the words "cease and desist," but Vullo demanded that Lloyd's "cease[] providing insurance to gun groups, especially the NRA." (App. 200.) She notes that Sheriff Dart's letter in *Backpage.com* invoked his official position and cited the federal money-laundering statute, but Vullo invoked her

authority as head of DFS and cited the regulated entities' risk management obligations, an area directly within DFS's regulatory purview. (App. 202, 212.) And, unlike Sheriff Dart, who "had no authority to take any official action with respect to Visa and MasterCard," Vullo had power to take sweeping regulatory action against the NRA's insurance partners.

Although Vullo contends that, unlike Sheriff Dart, her communications did not "insinuat[e]" that companies that serviced the NRA "were accomplices to any criminal activity," that is not true. Her backroom threats directly asserted that Lloyd's and other of the NRA's insurance partners were in violation of New York's insurance laws. (App. 199-200.)

Backpage.com noted that Sheriff Dart had no power to shut down Backpage's adult section directly. *Backpage.com*, 807 F.3d at 231. So too here, New York could not directly exclude the NRA from the insurance market based on its advocacy. Brief for Texas and Indiana as *Amici Curiae* at 6-7. Instead, much like how Vullo sought to destroy the NRA by targeting its ability to participate in the financial markets, Sheriff Dart "decided to proceed against Backpage not by litigation but instead by suffocation, depriving the company of ad revenues by scaring off its payments-service providers." *Backpage.com*, 807 F.3d at 231. Just as Vullo used her power to threaten legal action against financial services companies that facilitated the NRA's speech, Sheriff Dart "us[ed] the power of his office to threaten legal sanctions against the credit-card companies for facilitating future speech." *Ibid*.

Just as Sheriff Dart sought to have the credit card companies blacklist Backpage.com—and not just particular ads that "promote illegal products or services" (*id*. at 231-32)—here Vullo sought to coerce insurance companies to cease *any* dealings with the NRA, "irrespective of whether such programs comply with the Insurance Law." (App. 214.) Just as Vullo's backroom threats to the NRA's insurance partners succeeded in getting them to sever ties with the NRA, so too Visa and Mastercard quickly stopped allowing their cards to be used to purchase ads anywhere on Backpage. *Backpage.com*, 807 F.3d at 232.

In sum, the Second Circuit's decision below "suggest[s] a formula for permitting unauthorized, unregulated, foolproof, lawless government coercion." *Backpage.com*, 807 F.3d at 237. "The formula consists of coupling threats with denunciations of the activity that the official wants stamped out, for the target of the denunciation will be reluctant to acknowledge that he is submitting to threats but will instead ascribe his abandonment of the activity to his having discovered that it offends his moral principles." *Ibid*. That captures Vullo's strategy exactly. She combined heavy-handed backroom threats to the NRA's insurance partners with Guidance Documents denouncing the NRA's pro-Second Amendment speech and invoking the "backlash" against its advocacy. Thus, a financial services provider cutting ties with the NRA could blame the "backlash" against the NRA—not the official coercion. Indeed, the Second Circuit below sought to ascribe the decisions of the NRA's financial services

providers to "intense backlash" against the NRA's advocacy. (App. 8, 12-14.) In this case, however, the NRA's insurance partners stated, in private communications, that they were motivated by fear of regulatory reprisals. (App. 209-10; S. App. 29.)

Vullo characterizes the split as "shallow" because, supposedly, courts have not relied upon *Backpage.com*. (Opp. 26.) Not so. *Backpage.com* has been cited eight times by circuit courts, including an approving citation by the Seventh Circuit just last month. *Webber* v. *Armslist LLC*, ___ F.4th ___, 2023 WL 3945516, at *7 (7th Cir. June 12, 2023). And just this year, two district courts have applied *Backpage.com* to find First Amendment violations by public officials. *Missouri* v. *Biden*, __ F. Supp. 3d __, 2023 WL 4335270, at *43-44 (W.D. La. July 4, 2023); *DeJong* v. *Pembrook*, ___ F. Supp. 3d ___, 2023 WL 2572617, at *11-12 (S.D. Ill. Mar. 20, 2023) (denying qualified immunity based on *Backpage.com*).

III. Recent Cases Applying *Bantam Books* Underscore That the Issues Presented by the NRA's Petition Are Important and Recurring

Since the NRA filed its petition, two circuit court decisions have applied *Bantam Books* to claims that government censorship violated the First Amendment. While both involve much weaker facts than this case, they indicate that the issues presented by the NRA's petition are recurring and important, and lower courts would benefit from this Court's guidance.

In *Kennedy* v. *Warren*, U.S. Senator Elizabeth Warren wrote to Amazon urging it to "modify" its "potentially unlawful" practice of stocking popular books critical of vaccines. 66 F.4th 1199, 1204 (9th Cir. 2023). Denying preliminary relief, the Ninth Circuit emphasized that it would have been unreasonable for a bookseller to believe that a single member of Congress could "bring to bear coercive power" enforcing Warren's warnings. *Kennedy*, 66 F.4th at 1210. Although the facts of *Kennedy* are much weaker than those here (where Vullo's coercive power is clear), one panel member disagreed with the core of the court's reasoning, pointing out that "aspects of the letter could be interpreted as coercive by a reasonable reader." *Id*. (Bennett, J., concurring). Far from indicating that there is no need for this Court's review, as Vullo insists (Opp. 25-26), *Kennedy* indicates that lower courts require guidance from this Court in applying *Bantam Books* and that the issues presented by this petition are important and recurring.

Speech First, Inc. v. *Sands* involved a challenge to Virginia Tech's Bias Policy, which "allows members of the University community to report incidents of bias that occur at Virginia Tech." 69 F.4th 184, 188 (4th Cir. 2023). Reports were reviewed by "a panel of university administrators known as the Bias Intervention and Response Team (the BIRT)," and sometimes triggered an official letter convening a "voluntary conversation" with the Dean of Students. *Ibid.* Rejecting a First Amendment challenge, the Fourth Circuit distinguished *Bantam Books* based on the BIRT's total

lack of "coercive authority." *Id*. at 193-94. Nonetheless, Judge Wilkinson dissented, contending that the Bias Policy would chill the speech of a reasonable college student in light of the power differential between the affected college students and the university administrator. *Id*. at 207-211 (Wilkinson, J., dissenting).

IV. The Second Circuit's Glaring Errors Regarding the Government Speech Doctrine and the Applicable Pleading Standard Warrant This Court's Review and Reversal

Finally, the Second Circuit's implication that Vullo might have permissibly targeted the NRA for selective enforcement based on dislike for its political views would have dangerous consequences in the absence of this Court's review and reversal. (Pet. 28-30.) The Second Circuit's invocation of the "government speech" doctrine to justify Vullo's threatening conduct constitutes precisely the "'dangerous misuse'" of this doctrine that this Court has warned of. Brief for Montana, et al. as *Amici Curiae* at 3 (quoting *Matal* v. *Tam*, 137 S. Ct. 1744, 1758 (2017)).

The Second Circuit badly misapplies the pleading standard in refusing to assume the truth of the NRA's allegations that Vullo threatened the NRA's insurance partners in backroom meetings beginning in February 2018. (App. 199-200.) Contrary to what the Second Circuit and Vullo contend (Opp. at 34), the NRA was not

required to plead the precise words used in meetings at which it was not in attendance—especially where the NRA pleads facts directly establishing that its financial services providers perceived Vullo's conduct as threatening.

The Second Circuit's unfairly heightened pleading standard (which exceeds even the heightened particularity required for fraud claims) also ignores the immense pressure on regulated financial institutions to comply with "even the most prosaic sounding guidance" from entities like DFS. Brief of Financial and Business Law Scholars as *Amici Curiae* at 2. This Court has recognized that a person's power over listeners can imbue the person's statements with a coercive message. *Vance* v. *Ball State Univ.*, 570 U.S. 421, 430 (2013); *NLRB* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 619 (1969). So too when government regulators speak to the regulated. Further, DFS's authority to police "reputational risk" means that Vullo's official guidance invoking regulated parties' risk management obligations carried with it enforcement risk.[1] That is particularly so where Vullo's warnings about "reputational risk" coincided with backroom threats to the NRA's financial

[1] See Julie Andersen Hill, *Regulating Bank Reputation Risk*, 54 Ga. L. Rev. 523, 557 (2019), https://scholarship.law.ua.edu/fac_articles/152 (noting that "[r]egulators claim broad enforcement authority over anything that presents an abnormal risk" and cataloging formal enforcement actions by regulators based on "reputational risk" posed by customers); App. 202, 212, 228-229.

services providers and seven-figure penalties against firms who failed to (but swiftly thereafter, did) "drop" the NRA.

The Second Circuit draws inferences in favor of Vullo, asserting that she was "motivated by" nothing more than "her duty to address" alleged violations of New York insurance regulations. (App. 33.) But Vullo's then-boss, Andrew Cuomo, made clear that the "regulations NY put in place [we]re working" for their intended purpose: to "forc[e] the NRA into financial jeopardy," and ultimately "shut them down."[2] If such statements linking political animus to regulatory action—combined with well-pleaded allegations that threats were made, and acted upon—cannot overcome the pleading-stage hurdle, then regulators who wield their power to punish political opponents are immune from the redress *Bantam Books* affords.

CONCLUSION

This Court should grant *certiorari* to reiterate its clear holding in *Bantam Books*—courts must "look through forms to the substance," and consider "thinly

[2] Andrew Cuomo (@andrewcuomo), Twitter (Aug. 3, 2018, 2:57 PM), https://twitter.com/andrewcuomo/status/1025455632755908608.

veiled threats" and not just express threats. *Bantam Books*, 372 U.S. at 67-68.

Respectfully submitted,

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