No. 22-842

In the
Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA,
Petitioner,

v.

MARIA T. VULLO,
Respondent.

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

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER AND FOR REVERSAL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER SOURCES

INTEREST OF THE AMICUS

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of civil liberties secured by law and the advancement of constitutional governance. The ACLJ has submitted amicus briefs, *inter alia*, in a variety of cases in the U.S. Supreme Court and numerous U.S. Courts of Appeal. The ACLJ offers this brief to underscore the free speech dangers of a state regulatory agency suppressing political speech of citizen advocacy groups through blacklisting and pressuring the companies that it regulates into refusing to deal with those groups.[1]

SUMMARY OF THE ARGUMENT

Petitioner, the National Rifle Association of America ("NRA"), correctly relies on *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), to defend its First Amendment rights. Pet. Writ Cert. ("Pet.") 3, 14-16, 19, 21, 23-24, 26, 33-35, 38. *Bantam Books* alone is sufficient to settle this matter in Petitioner's favor.

But the Second Circuit used at least two approaches that avoid the instruction of *Bantam Books*, blur First Amendment lines, and create broad opportunities for state censorship through strong encouragement of third-party blacklisting.

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[1] No counsel for a party authored this brief in whole or in part, nor did any counsel of a party or any party make a monetary contribution intended to fund the preparation or submission of this brief.

One Second Circuit approach, springing fully grown from its own precedents, constitutionalizes government "persuasion" of its regulated entities to blacklist disfavored third party citizen organizations, while only outlawing as a First Amendment breach conduct that rises to government "coercion" of regulated companies to censor or retaliate against others at government request. *Nat'l Rifle Ass'n of Am. v. Maria T. Vullo*, 49 F.4th 700, 715, 720 (2d Cir. 2022). Not only is this an incorrect statement of the law, but framed this way government agencies are free to tip the free speech scales with heavy handed "persuasion," using an endless number of creative regulatory tactics that it can impose on its regulated private companies to intentionally accomplish censorship of, or retaliation against, third party advocacy groups that the agency dislikes. By any other name, that is still government censorship.

The other problematic approach of the Second Circuit minimized the importance of a leveraging tactic used by Respondent Vullo's Department of Financial Services ("DFS") through its investigation of merely "technical" violations by regulated insurance companies that did business with NRA, followed by its strong efforts to "encourage" those companies and other regulated entities to boycott NRA or discontinue gun rights insurance programs with that Second Amendment group; DFS ultimately extracted a consent order from those several companies "whereby the companies agreed to pay a total of more than $13 million in fines and to discontinue the programs" with NRA. *Id*. at 718. The Court of Appeals ruled that none of that presented a free speech problem. *Id*. at 714-715 n. 12, 717.

As a result, there is a need for a clearer formula for current state action doctrine, a legal doctrine not expressly mentioned and only implicitly present in *Bantam Books*, but one that applies well in this case to the DFS regulatory agency. That doctrine properly applied should forbid government pressure deliberately aimed at regulated intermediaries for the purpose of using them to target and punish an unregulated citizen advocacy third party like NRA, primarily because of that third party's position on matters of public concern, here, regarding gun rights.

Potent regulatory power coupled with agency pressure intentionally imposed on regulated entities for the express purpose of using them to blacklist third party citizen groups should create a rebuttable presumption of state action sufficient to trigger the First Amendment. The intentionality of Vullo's use of regulatory power to advance her campaign of suppression against NRA is clear.

The Second Circuit opinion plainly recognized NRA's factual allegations that showed DFS's head Vullo deliberately sought to enlist its regulated insurance companies to retaliate against Second Amendment advocacy groups.[2] For instance, in a meeting with DFS's regulated insurance company Lloyd's of London, she expressed "[her] desire to leverage [her] powers to combat the availability of firearms," and sought "Lloyd's aid in 'DFS's campaign against gun groups'" like NRA; she then upped the

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[2] The Second Circuit recognized that those pleaded facts were derived from "NRA's second amended complaint (the 'Complaint'), the exhibits attached thereto, and documents integral to and referenced in it." *Nat'l Rifle Ass'n of Am.*, 49 F.4th at 707.

ante with an enforcement threat against Lloyd's by raising the issue of that company's "technical" regulatory violation which she stated could be cured "by no longer 'providing insurance to gun groups' like the NRA." *Nat'l Rifle Ass'n of Am.*, 49 F.4th at 708 (citation omitted).[3]

In light of those well-pleaded facts, three aspects of traditional state action doctrine support the Petitioner.

First, despite the rather narrow focus of DFS's agency mission, the Respondent, the chief of the DFS, used her broad agency power, which included the ability to refer companies for prosecution, to formally investigate and then intentionally pressure insurance

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[3] The DFS also pursued a parallel, similarly "technical" charge against NRA for promoting those insurance programs to its members. That resulted in an administrative Consent Order with NRA, *see* N.Y. State Dep't of Financial Services, Consent Order, Department of Financial Services, *In the Matter of the National Rifle Association of America*, Case No. 2020-0003-C (Nov. 13, 2020), https://www.dfs.ny.gov/system/files/documents/2020/11/ea20201118_co_nra.pdf [hereinafter Consent Order], referenced by Respondent, Resp't Br. Opp'n 3 n.3. Except for the fine, the settlement was all bluster and no bite, with recitations that NRA had relied on New York licensed brokers to provide "lawful" services regarding the insurance programs, Consent Order, ¶ 16, and that NRA had likewise relied on licensed brokers to develop *lawful* promotional services that it participated in, *id.* ¶ 23. Most importantly, the Consent Order preserved, without prejudice, NRA's pursuit of this lawsuit and the very allegations against DFS' Vullo, one of the defendants in the underlying civil action, that now are the subject of this appeal. *Id.* ¶ 40. Political puffery aside, this was hardly the stuff of a regulatory victory, suggesting perhaps that in the end, DFS may have recognized that pursuit of those "technical" violations was a flawed idea.

companies into breaking business ties with a Second Amendment group that the agency wanted targeted, all accomplished in a manner that was far afield from DFS's own description of its narrow focus and its mission. This easily satisfies the "significant encouragement" state action test, which is a stand-alone alternative to the "coercion" test.

Second, despite the gist of the Second Circuit's reasoning, this Court has stated that determining either state "coercion" or "significant encouragement" of private actors sufficient to create state action does not require proof that private companies were ever "compelled" to act at all. Further, those tests should not be confused with the use of strict proximate causation principles applied in other legal contexts, like tort law or statutory actions for discrimination. State action involves broad constitutional considerations, such as citizen free speech and agency restraint, not mechanical cause-and-effect determinations.

Third, a government agency or agency chief manipulating regulated businesses to do its bidding in order to financially hobble political enemies, is a particularly pernicious violation of the First Amendment and must be stopped. The intentional and unauthorized targeting of citizens by official agencies has been prohibited by the Court in other contexts and should be equally abhorrent under the facts of this case.

ARGUMENT

I. *Bantam Books* Should Solve this Case

In *Bantam Books*, the government-created commission was tasked with reviewing potentially obscene publications. 372 U.S. at 59. Like the DFS here, that commission was empowered "to investigate and recommend the prosecution of all violations." *Id.* at 60.

Also, markedly parallel to this case, the core problem faced in *Bantam Books* was the conduct of the commission in having distributed "blacklists;" there, of publications that the commission deemed to be obscene. *Id.* at 61-63, 68. When circulated to book distributors, the blacklists accomplished the desired suppressive effect, *id. at* 63, as did the DFS blacklisting of NRA here.

In *Bantam Books*, distributors ceased to distribute the listed books. *Id.* at 63. Holding that this commission's system of blacklisting, investigation and warning was a First Amendment violation, the Court concluded: "It would be naive to credit the State's assertion that these *blacklists* are in the nature of mere legal advice, when they plainly serve as instruments of regulation independent of the laws against obscenity." *Id.* at 68-69, 71 (emphasis added).

In fact, the one material difference between the conduct of the DFS and the commission in *Bantam Books* stands the NRA on even stronger footing than the book distributors in that case. In *Bantam Books*, the authority of the review commission-was explicit; it was to review the expressive content of publications.

Here, as we note, *infra* 7-8, the scope of DFS's authority had nothing to do whatsoever with policing the policy positions or activities of gun advocacy groups.

Thus, this case necessitates a deeper view of this Court's state action doctrine, where its proper application here should result in the Petitioner NRA prevailing.

II. The Regulated Banks and Insurance Companies Were Susceptible to Cloaked Pressure by Government

A. The DFS Agency Used Its Regulatory Power to Significantly Encourage, if Not Coerce, Its Regulated Companies to Punish the NRA

New York's DFS is a regulatory agency that "can initiate civil and criminal investigations and civil enforcement actions . . . and refer matters to the attorney general for criminal enforcement . . . DFS directives regarding 'risk management' must be heeded by financial institutions." Pet. 8. The coercive nature of DFS's investigative powers are made obvious by it its investigative activities in this case. Resp't Br. Opp'n 2-3.

An official DFS guidance was issued to every bank and insurance company operating in New York mentioning the NRA by name as an organization of concern; it was also accompanied by a same-day press release from Respondent Vullo as head of DFS explicitly urging them to discontinue any business

with the NRA. Pet. 10. The given reason was not financial misconduct, violation of regulatory mandates, or anything relevant to DFS's scope of authority, but rather, the "reputational risks" that would supposedly result from transacting business with NRA. *Id*.

The unsurprising result was that "numerous financial institutions perceived Vullo's actions as threatening and, therefore, ceased business arrangements with the NRA or refused new ones." Pet. 3.

This pressured outcome punished the NRA because of its Second Amendment position and advocacy of the same. It was accomplished by a state agency leveraging its authority against private financial and insurance institutions to do its bidding. That easily fits within the category of government acts that are forbidden under the First Amendment.

The narrow regulatory mission of the DFS agency is in stark contrast with the broad, defamatory attack it made against NRA in communications to its regulated businesses.

DFS defines its core focus as "the regulation of financial services in New York . . . to guard against financial crises and to protect consumers and markets from fraud," which may also include matters touching on "the provisions of the Insurance Law and the Banking Law."[4] Like most government agencies, the core activities of DFS, with the sole exception perhaps of investigating fraudulent advertising, has nothing to do with the content of public expression or citizen

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[4] *Department of Financial Services*, New York State https://www.dfs.ny.gov/node/11321 (last visited Dec. 11, 2023).

positions on matters of public concern. Moreover, it has even less to do with the views of a private advocacy organization on matters of gun rights.

There are only a few situations where a regulatory agency can constitutionally supervise and regulate the content of speech and expression. But those exceptions bring into focus the audacity and illegality of the DFS chief's action here.

One rare example, standing in stark contrast to DFS's narrow regulatory scope, is the authority granted to the Federal Communications Commission, which possesses a special "broad" power regarding broadcast content, *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 214, 219 (1943). However, that type of authority is not an inherent power that other agencies possess. It was specifically granted to the FCC because of the "unique medium" of broadcasting which is its province; yet even there, the FCC's power is still subject to free speech principles under the First Amendment. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

By contrast, the exceedingly narrow mission and scope of the DFS's market "fraud" authority makes even more obvious the political nature of the actions of the DFS chief here. She meted out punishment against the NRA with the hearty support and urgings of the Governor of New York. Pet. 8.

In light of the absence of authority that DFS possessed over expression or advocacy in almost any regard, it becomes clear that the blacklisting of NRA was a purely political, and not a regulatory, action. The scheme was to rally deputies to carry out that mission choosing, rather than DFS agency employees, private insurance and financial entities instead, over

which the DFS had the power to investigate and refer for prosecution. In reality, that power, when coupled with strong admonitions to regulated companies to distance themselves from NRA, creates a strong presumption not only of "significant encouragement," but also coercion.

After all, just as "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around" in obeying an unauthorized demand, *Bantam Books*, 372 U.S. at 68, so too, regulated insurers and banks do not easily brush aside strong statements to stop dealing with NRA, voiced by the very regulator who can financially or reputationally ruin them. The bitter irony is the fact that the threat of "reputational" damage to those banks and insurance companies if they did not obey, was the cudgel used by the DFS chief to inflict reputational damage against NRA through the use of those private company intermediaries.

Regulated entities are particularly sensitive to this kind of indirect but effective pressure by the government unit that regulates them, whether it comes in the form of a carrot or a stick. In *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989), the Court analyzed the incentives that the federal government used to employ private railroads to conduct and report the results of drug tests administered to employees pursuant to the 1970 Federal Railroad Safety Act, which granted authority to the Secretary of Transportation to prescribe safety

rules.[5] An association of railway labor groups sued on the grounds that the rules that resulted, which authorized private railroad companies to conduct drug tests and report them to the federal authorities, violated the employees' rights to be free of unreasonable search and seizure under the Fourth Amendment. *See id.* at 612.

The preliminary question was whether the rules on their face showed a sufficient nexus of government encouragement to, and participation with, private railroads in the drug testing practice to implicate constitutional rights. *See id.* at 614-15. Holding that they did, the Court found that:

> The Government has *removed all legal barriers* to the testing authorized by Subpart D, and indeed has made plain not only its *strong preference* for testing, but also its *desire to share the fruits of such intrusions*.

Id. at 615 (emphasis added). Thus, the Court recognized three aspects of state action that are relevant to this case.

First, the government helped to enable the private action ("removed" legal incumbrances). Second, it stated its "preference" for the desired action, and, third, it stood to benefit in a self-interested way in the specific outcome ("a desire to share the fruits" of the contested activity).

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[5] "The Federal Railroad Safety Act of 1970 authorize[d] the Secretary of Transportation to 'prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety.'" *Skinner*, 489 U.S. at 606 (citation omitted).

In this case, the first *Skinner* factor is present because the Complaint alleges that the DFS chief had actively enabled the blacklisting by having "secretly offered leniency to insurers for unrelated infractions if they dropped the NRA," Pet. 3, which is equivalent to the "remov[ing] [of] . . . legal barriers" in *Skinner*.

Second, as in *Skinner*, DFS stated its express "preference" that the NRA be ostracized. Pet. 3.

Third, the DFS chief stood to benefit by reaping the political "fruits" of the blacklisting outcome: the "boasts by Vullo's boss, Governor Cuomo, that her regulatory actions were [achieving the desired goal of] 'forcing the NRA into financial jeopardy,'" Pet. 5, shows that Vullo had gained points for launching her retaliation campaign against NRA. In these three factual respects, this case is on all fours with *Skinner*.

Nor does the Court's opinion in *Blum v. Yaretsky*, 457 U.S. 991 (1982), undermine a finding here of regulatory coercion and significant state encouragement. Like *Skinner*, *Blum* is another prism through which to identify when private regulated parties are responsible for the subject conduct rather than the state as in *Blum*, or when, as in this case, the state has been the initiating and guiding force behind those regulated private entities that it has manipulated into unconstitutional action.

In *Blum*, although nursing homes in the state were regulated, *id.* at 1004, and state regulations expressed a priority for the discharge of patients or their transfer to lower levels of care when appropriate, *see id.* at 994-95, the Court declined to hold the State responsible for the private nursing homes' "decision[s] to discharge or transfer particular patients" because those decisions "ultimately turn[ed] on medical judgments made by

private parties," *id*. at 1008. More specifically, the private entities actually making the critical decisions about patient transfers in *Blum* were not the nursing homes implementing those decisions, but rather, the "review committee (URC) of physicians whose functions included periodically assessing whether each patient [was] receiving the appropriate level of care, and thus whether the patient's continued stay in the facility [was] justified." *Id*. at 994-95.

One major distinction between this case and *Blum*, then, is the intervening medical judgement of licensed UNC doctors in *Blum* who were required, under their own independent, professional obligation which was ultimately subjected to licensing oversight of outside medical boards, to decide when, and under what conditions, a patient should be transferred or provided with a certain level of care. This Court found that "[t]hose decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." *Id*. at 1008. Conversely, in this case there were no intervening independent professional standards at play concerning whether to blacklist an advocacy group from obtaining insurance or financing.

There are even more important distinctions from *Blum*. One turns on which party, the government, or the private company, initiates the idea that results in the suspect action. Unlike the subject case against the DFS chief, where the blacklisting idea as outlined in the Complaint had been initiated by the state, the private URC physicians committee in *Blum* "initiated" the critical decisions. It all began with the judgment of private doctors: whether it was "URC-*initiated* transfers to lower levels of care," *id*. at 999 (emphasis

added), or the alleged "threat of transfers to *higher* levels of care, whether *initiated* by the URC's, the nursing homes, or attending physicians," *id*. at 1001 (emphasis added).[6]

Thus, a key factor in *Blum* was that the critical decision-making at issue was initiated by private parties rather than by the government. On the other hand, when the state is the one that initiates, i.e., is the one to cause or facilitate the beginning of the blacklist proposal as had happened here, that is strong evidence of state action, rather than independent private decision making.

Also, unlike this case, in *Blum*, there was "no suggestion that those decisions were *influenced in any degree* by the State's obligation to adjust benefits in conformity with changes in the cost of medically necessary care." *Id*. at 1005 (emphasis added). In other words, there was an utter lack of evidence of coercive or influential action or effect. By contrast, here the complaint is replete with allegations of intentional and effective influence by the state on insurance companies and financial entities to punish NRA.

The appropriate state action test should make it harder, rather than easier, for regulatory agencies to use what the Court criticized in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 301 (2001), as cloaked "winks and nods"

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[6] We take the Court's use of "initiate[ ]" to embrace the ordinary meaning of that term: "to cause or facilitate the beginning of : set going." *Initiate*, Merriam-Webster, https://www.merriam-webster.com/dictionary/initiate (last visited Dec. 11, 2023).

regulatory tactics to achieve desired results.[7] In this case, it was accomplished through "guidance" documents and other messages that in reality were directives targeting a specific organization, covertly enlisting regulated private parties to do the retaliatory blacklisting that the DFS could not do overtly. Such a judicial test should focus on erring on the side of constitutional values and regulatory restraint. As one legal commentator has astutely observed, "the First Amendment institutionalizes a strong preference, if not a command, for government actors to channel regulatory demands via formal mechanisms rather than informal ones."[8]

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[7] Helpful analogies abound in state action rulings. In *Brentwood*, covert agency use of "winks and nods" tactics was not only recognized as a problem by the majority, 531 U.S. at 301, but at least in theory, by the dissent also, disagreeing only on whether the facts supported it, *id*. at 307 (Thomas, J., dissenting). The majority in *Brentwood* and the dissent also agreed in theory that "symbiotic relationship" between government and private entities can create state action. *Compare id*. at 305 (Thomas, J., dissenting), *with id*. at 301 n.4 (the majority's reference to "symbiosis"). Basic biology says that there is such a thing as a parasitic symbiotic relationship, where the parasite (here, the DFS), benefits itself while harming its host entities (i.e., the regulated companies that were pressured and investigated, some even being fined).

[8] Derek E. Bambauer, *Against Jawboning*, 100 Minn. L. Rev. 51, 60 n.58 (2015) (citing Derek E. Bambauer, *Orwell's Armchair*, 79 U. Chi. L. Rev. 863, 899–905 (2012); Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 Va. L. Rev. 479, 489, 492–504 (2012)).

B. The Persuasion vs. Coercion Distinction Ignores Practical Reality

Respondent Vullo has frequently cited the supposed constitutional dichotomy between the governmental use of lawful "permissible persuasion" as opposed to "unconstitutional coercion." Resp't Br. Opp'n 10. *See also id.* at 14-15, 20, 22-23, 25, 35. But such a formula is too simplistic and too prone to abuse.

After all, "persuasion" under the facts here could be properly interpreted as synonym for the DFS providing forbidden "significant encouragement" to private parties to do the government's bidding, something that triggers constitutional protections as the Court noted in *Blum*, 457 U.S. at 1004. Besides, coercion is not the sole test. The alternative test is "significant encouragement."

Government can be held responsible for a private decision "when it has exercised coercive power *or has provided such significant encouragement*, either *overt or covert*, that the choice in law must be deemed to be that of the state." *Id.* (emphasis added). *See also Brentwood*, 531 U.S. at 296 (quoting *Blum*, 457 U.S. at 1004).

Covert encouragement or manipulation by government can be the type that controls an outcome via private intermediaries through the skillful use of "winks and nods" rather than through formal organizational ties or official mandates. *Brentwood*, 531 U.S. at 301. The relevance of that, is that "if formalism were the sine qua non of state action, the doctrine would vanish owing to the ease and inevitability of its evasion, and for just that reason formalism has never been controlling. For example, a

criterion of state action like symbiosis . . . looks not to form but to an underlying reality." *Id.* at n.4.

The test of "significant" encouragement, obscured if not actually ignored by the Second Circuit, differentiates unconstitutional persuasion from mere passive agency suggestion. For instance, merely approving or acquiescing in the actions of a private entity (passive suggestion) is not sufficient to hold the state responsible for those actions. *Blum*, 457 U.S. at 1004-05; *Rendell-Baker v. Kohn*, 457 U.S. 830, 841-42 (1982). But the DFS did much more than that.

Here, Respondent Vullo concedes that, at a minimum, "she issued public statements to thousands of industry participants *encouraging them* to examine their ties to gun promotion organizations." Resp't Br. Opp'n 23 (emphasis added). The only question then is whether those "statements of encouragement," *id.*, that are conceded here, were significant encouragement sufficient to invoke the First Amendment. They are.

The encouragement here by the DFS was "significant" because, in addition to the veiled threat of "reputational" harm if its proposals were not heeded, those messages were also expressed by a regulatory agency to the very companies that it regulated, i.e., companies that were subject to punishment, investigation, or prosecution. Thus, the pressure that was exerted was necessarily "to such a degree that [the companies] 'choice'—which if made by the government would be unconstitutional." *Missouri v. Biden*, 83 F.4th 350, 373 (5th Cir. 2023) (citing *Norwood v. Harrison*, 413 U.S. 455, 465 (1973)). Added to this is the political context in which the DFS exerted that pressure, with the state governor publicly

praising the Respondent DFS chief for targeting the NRA.

This is not a close case. But even if it were, considering the nature and political context of the pressure imposed on private businesses by the DFS and the obvious threat to NRA's First Amendment rights, the benefit of the doubt should go to NRA's expressive right to advocate without fear of retaliation or penalty. *Citizens United v. FEC*, 558 U.S. 310, 327 (2010).

III. The State Action Test Here is the Opposite of But-For Legal Causation

Do the coercion and significant encouragement tests for state action include an implicit causation test, and more specifically, the kind of but-for test one commentator described as a force created by the Supreme Court that was likely to "shake the core" of discrimination litigation in other contexts, like employment cases?[9] No. State action questions are resolved by a different frame of reference altogether.

In tort law, a but-for causation formula is often applied, although the application of that test in discrimination cases has been criticized in some quarters as overly simplistic.[10] Most recently, the

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[9] D'Andra Millsap Shu, *The Coming Causation Revolution in Employment Discrimination Litigation*, 43 Cardozo L. Rev. 1807, 1812 (2022), https://cardozolawreview.com/wp-content/uploads/2022/09/2_SHU.43.5.8.FINAL_.pdf.

[10] The but-for causation test has also been criticized as a "simplified theory" that should be replaced in discrimination cases. Guha Krishnamurthi, *Not the Standard You're Looking for: But-for Causation in Anti-Discrimination Law*, 108 Va. L.

Court has applied that test to claims brought under 42 U.S.C. § 1981.[11] In matters of statutory interpretation, some have contended that the Court has adopted a kind of but-for causation "canon."[12]

Because a state action analysis involves whether the government Respondent has either "coerced" or given "significant encouragement" to private actors to injure the Petitioner, it may be tempting to resolve those questions by using a but-for approach. However, that would be a mistake, as that formula has no place in this type of constitutional analysis.[13]

The proper question in weighing whether government impetus has resulted in private conduct becoming state action, is whether either "coercion" or "significant encouragement" has been provided by DFS to private companies sufficient to implicate the First Amendment. *See Blum*, 457 U.S. at 1004.

Unlike the typical common law or statutory causation analysis, the question here—whether the

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Rev. Online 1, 22-23 (2022), https://virginialawreview.org/wp-content/uploads/2022/01/Krishnamurthi_Book_108.pdf.

[11] *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020).

[12] Sandra F. Sperino, *The Causation Canon*, 108 Iowa L. Rev. 703 (2023), https://ilr.law.uiowa.edu/volume-108-issue-2/causation-canon.

[13] We have found only one suggestion that the state action doctrine contains a formal "causation" element. One commentator has noted that state action analysis "overlaps with the Takings Clause's causation requirement" in a civil action for unconstitutional takings of private property. Jan G. Laitos & Teresa Helms Abel, *The Role of Causation When Determining the Proper Defendant in a Takings Lawsuit*, 20 Wm. & Mary Bill of Rts. J. 1181, 1196 (2012). Regardless, that type of claim is far afield from one grounded in the First Amendment, as here.

government has improperly tried to deputize private companies to do what it could not have done constitutionally on its own—involves constitutional considerations that are much broader than simply measuring the degree of cause-and-effect.

For instance, superficial facts that might otherwise support a finding of governmental involvement in private action might be "outweighed in the name of some value at odds with finding public accountability in the circumstances." *Brentwood*, 531 U.S. at 303. The dissent in *Brentwood* also recognized that in the traditional state action analysis, determining whether the state has "exercised coercive power or . . . provided such significant encouragement" to private actors, "either covert or overt," 531 U.S. at 310 (quoting *Blum*, 457 U.S. at 1004), is, after all, a constitutional matter, designed to "preserve[ ] an area of individual freedom by limiting the reach of federal law and federal judicial power," *id.* at 306 (Thomas, J. dissenting) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982)). Those broad constitutional values transcend the but-for causation formula that measures whether a wrongful act was a necessary, compelling force in producing the harm.

The more flexible, context-driven constitutional approach that should apply here rejects the requirement that the DFS be shown to have been the *sine qua non* of the retaliatory actions against NRA by insurance companies and financial institutions.

In fact, the correct test does not require any proof that NRA "compelled" insurance or financial institutions to blackball the NRA. As *Skinner* makes clear, "[t]he fact that the Government has not compelled a private party to perform [the adverse

action] does not, by itself, establish that the [conduct] is a private one;" rather, the focus is on the fact that "the Government did more than adopt a *passive position* toward the underlying private conduct." 489 U.S. at 615 (emphasis added).

Skinner, if properly applied, is directly opposite to the but-for analysis. Under *Skinner*, the question was not whether the state's pressure was the necessary force in harming the plaintiff; instead, the question was whether the harm was "*primarily* the result of private *initiative*." *Id.* (emphasis added). If not, state action is present.

If, as is alleged here, the private companies responded to the initiative of the state in the expected way, then the First Amendment applies, and the matter of state action is settled. *Who* initiated the blacklist campaign, then, is critical.

But that issue is settled. NRA specifically alleges that it began with DFS:

> Respondent here, wielding enormous regulatory power as the head of New York's Department of Financial Services ("DFS"), applied similar pressure tactics—including backchannel threats, ominous guidance letters, and selective enforcement of regulatory infractions—to induce banks and insurance companies to avoid doing business with Petitioner, a gun rights advocacy group.

Pet. i.

"[T]he Complaint alleges that numerous financial institutions perceived Vullo's actions as threatening

and, therefore, ceased business arrangements with the NRA or refused new ones." *Id.* at 3. DFS pressure made insurance companies and banks hesitate to transact business with NRA. As the Petitioner points out:

> Needing to remain in DFS's good graces, Lloyd's stopped underwriting lawful NRA-related insurance. The NRA has encountered similar fears from providers of corporate insurance, and even banks contacted for basic depository services. Before Vullo's threats, the same banks engaged readily with the NRA.

Id. at 12 (citations omitted).

The "primary" initiative for a market wide retaliation against the NRA among New York insurance companies and financial industries did not begin with the private insurance and finance companies but flowed from DFS's anti-NRA campaign. That necessarily means that the blacklisting result is something for which the DFS is constitutionally accountable under the First Amendment.

IV. State Financial Censorship over Viewpoint is Pernicious

While the scope of the DFS activities is defined by that agency as narrow, the breadth of economic impact from its activities is huge. This is demonstrated by the reach that DFS has over New York State's insurance companies and financial institutions:

> The Department of Financial Services supervises and regulates the activities of nearly 3,000 financial institutions with assets totaling more than $8.8 trillion as of Dec. 31, 2021.
>
> The types of institutions regulated by the Department include:
>
> More than 1,700 insurance companies with assets of more than $5.5 trillion
>
> . . . [and]
>
> More than 1,200 banking and other financial institutions with assets totaling more than $3.3 trillion.[14]

Of course, the mere regulatory power and reach of a state agency alone do not turn adverse actions of regulated companies into state actors for First Amendment purposes. On the other hand, when agency power and reach are deliberately used to manipulate third party regulated entities to do the government's unconstitutional bidding—as in this case—that is a very different matter.

One useful contrast can be made between the overreaching initiative of DFS to use private intermediaries to penalize NRA, and a very different situation where an online financial business, on its

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[14] *About Us*, Dep't of Fin. Servs., https://www.dfs.ny.gov/About_Us (last visited Dec. 12, 2023).

own initiative seeking to penalize the expression or beliefs of customers whom it perceived to be purveyors of "misinformation," and then, after the fact, it happens to catch the attention of a regulator.

When news broke in 2022 that the online payment service PayPal was considering a policy of inflicting penalties against payment accounts that spread "misinformation," it reached the attention of Consumer Financial Protection Bureau Chief, Rohit Chopra. According to news reports, his after-the-fact reaction to that news was to "look at the facts of the matter," which he considered to be "new territory" for his agency; shortly after, PayPal announced it would not be implementing such a policy.[15]

Neither PayPal's contemplated policy, nor its announced retraction, involved state action. Whether its policy was formal or informal, or whether an "error" had simply been made as later contended by PayPal, the original initiative for the proposed policy lay with that private online company. The initiative was never from the government Bureau because that agency simply responded through its chief to a public matter that putatively may have been an issue within that agency's scope.

DFS, by contrast, took the initiative to launch its own campaign specifically against NRA. As a result, the regulated companies, according to the Complaint, merely responded to that pressure in a predictable way, and that makes a critical difference.

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[15] Christopher Hutton, *PayPal Warned over Speech Restrictions by Powerful Financial Regulator*, Wash. Examiner (Oct. 12, 2022), https://www.washingtonexaminer.com/policy/technology/paypal-penalties-misinformation-new-territory-cfpb-director.

In deciding standing issues for example, where a link must be shown between "independent actors" responding to a government policy and the prospective harm to the plaintiff caused by those actors, this Court has noted that potential or actual harm can be substantiated by showing that those third-party actors acted in predictable ways. *California v. Texas*, 141 S. Ct. 2104, 2117 (2021) ("[T]he plaintiff must show at the least 'that third parties will likely react in predictable ways.'") (quoting *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019)). Applying this same commonsense notion to state action here, it is clear the third-party regulated companies acted "in predictable ways" by punishing NRA after government pressure was placed on them, especially based on the nature of DFS's communications and the power that it wielded.

Legal parameters crafted in this way respect the individual freedom of commercial enterprises to pursue lawful business policies that spring from fully private decisions, yet at the same time, those rules are equipped to address a serious trend of covert government power that intentionally stifles free speech through pressuring private, regulated intermediaries. The commercial marketplace should be given breathing room, free of overt threats from regulators, to make their own decisions regarding corporate social responsibility. Apparently however, the head of DFS did not trust the free market that was her province to protect.[16]

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[16] The fact that some businesses on their own decided to distance themselves from gun rights groups before the DFS chief's official anti-NRA campaign does nothing to advance the Respondent's

When official agencies have intentionally targeted citizens or their ideas in order to stifle dissent or to retaliate, the Court has not hesitated to prohibit it in other contexts. *See 303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2313 (2023) (finding state government had illegally "compelled speech" where "coercive '[e]liminati[on]' of dissenting 'ideas' about marriage constitutes Colorado's 'very purpose'" in applying its law against the plaintiff); *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (violation of equal protection where a village made an "intentional," irrational and arbitrary (if not ill-willed) demand that a particular property owner endure a twice greater easement requirement than other owners); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (Free Exercise Clause violated when the City intentionally targeted a religious group).

Government agencies that use their administrative power to deliberately target those that hold views that depart from the state's preferred political narrative is a pernicious threat to the First Amendment. It is a poisoning of the well of public discourse that is already being tainted by other forces. Daily, the values inherent in the First Amendment are being ignored or openly challenged as passé in America. The solution is a return to constitutional first principles rather than abandoning them. The legal profession itself has been caught up in this

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case. The Complaint focused on those entities that obeyed DFS blacklisting effort to harm the NRA, not others. Also, that some businesses chose on their own, unprovoked by DFS, to reject gun groups shows that DFS's heavy handed regulatory targeting of NRA lacked a compelling governmental interest, even if that conduct had been within DFS's primary authority.

struggle. The American Bar Association has been faced with taking action in order to restore free speech in law schools, as they prepare the next generation of lawyers and jurists who will either understand, or will undermine, those constitutional values.[17]

Longstanding free speech first principles were side-stepped by the Second Circuit in this case. Those principles, prohibiting government from using its levers of power or regulatory oversight to punish dissenting ideas, spring from well-furrowed ground:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control.

Police Dept. of Chi. v. Mosley, 408 U.S. 92, 95-96 (1972) (internal citations omitted). That kind of unlawful "content control" was the very purpose of Vullo's DFS regulatory strategy against NRA.

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[17] Karen Sloan, *Law School Free Speech Proposal Moves Forward After ABA Vote*, Reuters (Nov. 17, 2023), https://www.reuters.com/legal/government/law-school-free-speech-proposal-moves-forward-after-aba-vote-2023-11-17/?utm_source=Sailthru&utm_medium=Newsletter&utm_campaign=Daily-Docket&utm_term=112023&user_email=dfe42f02413f5e9629eee010dfdd7fe5eeae7af49135e339baec7128f7d61ed9.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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