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

BRIEF OF *AMICUS CURIAE* THE COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF PETITIONER

Devin Watkins
Counsel of Record
DAN GREENBERG
COMPETITIVE ENTERPRISE INSTITUTE
1310 L St. NW, 7th Floor
Washington, D.C. 20005
(202) 331-1010
Devin.Watkins@cei.org
Dan.Greenberg@cei.org

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Attorneys for Amicus Curiae

QUESTION PRESENTED

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?

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INTEREST OF AMICUS CURIAE[1]

The **Competitive Enterprise Institute** (CEI) is a nonprofit organization headquartered in Washington, D.C., dedicated to promoting the principles of free markets and limited government. Since its founding in 1984, it has done so through policy analysis, commentary, and litigation.

The analysts of the Competitive Enterprise Institute have regularly observed government bodies that attempt to stifle liberties protected by the First Amendment in much the same way that Respondent is alleged to have done. Amicus believes that government officials often use such tactics to evade constitutional requirements. Public officials cannot directly silence opinions they do not like or command other persons to carry out political agendas, but the use of threats and coercion allows those public officials to pursue objectives indirectly that they cannot execute directly. Such tactics erode constitutional norms and degrade the general welfare of the people.

SUMMARY OF ARGUMENT

Our Constitution is meant to protect the people from the abuse of the immense powers of the nation's government. The case at hand brings an important question to center stage: when a government body or

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and that no person other than *amicus*, its members, or its counsel made such a monetary contribution.

actor attempts to evade constitutional requirements by placing formal or informal sanctions upon others, such as the threat of a lawsuit or another official action, what protections does the Constitution provide?

Petitioner alleges that Respondent, the head of a powerful government agency, explained to the institutions she regulated that doing business with the (disfavored) petitioner would create "reputational risk" that would be apparent to regulators. Pet. 10. Petitioner further alleges that the regulatory agency suggested to the regulated parties that they could reduce their exposure to fines and penalties if they stopped doing business with Petitioner. *Id.* at 3. Petitioner further alleges that the regulatory agency made an example of regulated parties who did business with them by increasing the parties' exposure to fines and penalties. *Id.* at 11. A large number of those regulated parties saw no mystery or ambiguity in these agency actions; what those parties saw was unambiguous pressure, coercion, and threats. *Id.* at 11-12.

The Respondent's actions created a chilling effect on the expression of views by any reasonable person who shared the Petitioner's viewpoint. No reasonable person could be expected to continue to espouse views like the Petitioner's in New York, knowing that its state government might threaten his or her associates with additional regulatory burdens just because of his or her speech.

Such abuse of government powers is coercion and censorship. Sadly, New York is not alone in these violations of the First Amendment. The very pervasiveness of this kind of government abuse—and the detrimental effects of such actions, both on large numbers of people and on established constitutional norms—should encourage this Court to end this abuse.

ARGUMENT

Sixty years ago, this Court found that the actions of a state commission were constitutionally impermissible: this Court found that commission to have violated First Amendment rights when it "deliberately set about to achieve the suppression of publications" through "informal sanctions"—such as the "threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

Such government behavior has come to be known as "jawboning." This term generally refers to government communication coupled with the use of state power to achieve political goals—either through intimation or unambiguous expression of threats, punishments, or other kinds of coercion. But "jawboning" is an unfortunate term, because its lighthearted connotation may disguise what is at its referent's core: plausibly deniable censorship through coercion. Jawboning is especially troubling when it opens the door to what might be called private-sector commandeering: that is, when it allows the government to draft others into service to accomplish political goals indirectly—even and especially when

there are legal and constitutional barriers that prevent the government from pursuing such goals directly.

This case is about a public official who abused her regulatory power so as to force third parties into penalizing an advocacy organization because of its political views. As Petitioner has demonstrated, such behavior raises large First Amendment issues. But the danger of private-sector commandeering driven by government's ire extends beyond First Amendment concerns. The consequences of jawboning spill over in ways that undermine the law's procedural protections and fundamental fairness.

The American political landscape is littered with instances of jawboning in the recent past. As shown below, jawboning has an extensive and shameful history in American politics and governance, and its incidence appears to be on the rise today. Some instances of jawboning focus on particular economic sectors. Other instances of jawboning are directed at relatively new forms of electronic communications and mass conversations; because of the ubiquity of social media, they have become increasingly prevalent. Finally, we supply several instances of 21st-century jawboning that demonstrate that such jawboning is not merely an incidental tactic that agents of government only infrequently or informally use; occasionally, some government actors try to make it an institutionalized program that carries with it its own staff, agenda, and institutional support.

I. RESPONDENT HAS CREATED AN UNLAWFUL CHILLING EFFECT ON DISAPPROVED VIEWPOINTS.

"This Court has found in a number of cases that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 11 (1972). Furthermore, this Court has "fully recognize[d] that governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights." *Id.* at 12–13.

The reason that such actions can be challenged, even though they only create indirect effects on speech, is that "[t]hese freedoms [of speech] are delicate and vulnerable, as well as supremely precious in our society." *NAACP v. Button*, 371 U.S. 415, 433 (1963). "The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *Id.*

Of course, any action the government takes could cause fear of its future actions, but this kind of free-floating fear cannot itself violate the First Amendment. The bar is higher. This Court requires more than "the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual." *Laird*, 408 U.S. at 11.

In other words, "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Id.* at 13–14.

"While the governmental action need not have a direct effect on the exercise of First Amendment rights, [as this Court has] held, it must have caused or must threaten to cause a direct injury to the plaintiffs" because of the exercise of their First Amendment rights. *Meese v. Keene*, 481 U.S. 465, 472 (1987).

This case is about governmental actions that caused direct injury to the speaker. A state government agency threatened to act against third parties and successfully coerced them into dropping their business relationships with the speaker. The agency tortiously interfered with the NRA's business relationships because of its protected speech.

New York has long recognized the harm caused by tortious interference with potential future business relationships. *NBT Bancorp Inc. v. Fleet/Norstar Fin. Grp., Inc.*, 87 N.Y.2d 614, 620 (N.Y 1996). Under New York law, such "'wrongful means' include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract ([Restatement (Second) of Torts] § 768, Comment e; § 767, Comment c)." *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 191 (N.Y. 2004) (citing *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 191 (N.Y. 1980)). In this case, there was no

physical violence, fraud, misrepresentation, or criminal actions, but Respondent did threaten civil actions and "some degree[] of economic pressure." Threats of adverse regulatory action if the business relationship was not dropped crossed the line from mere persuasion into actual harm to the Petitioner for its speech.

Once the Court determines that the government's actions have harmed the Plaintiff, it asks if the government's action placed a "burden on protected expression." *Meese v. Keene*, 481 U.S. 465, 480 (1987). To determine this, the Court examines whether the government action involved content-based, speaker-based, or viewpoint-based discrimination.

This case is similar to *Sorrell v. IMS Health Inc.* (2011). 564 U.S. 552. The government action in *Sorrell* was enacted "to target those speakers and their messages for disfavored treatment." *Id.* at 565. In *Sorrell*, this Court recognized that the "distinction between laws burdening and laws banning speech is but a matter of degree" and required that both "must satisfy the same rigorous scrutiny." *Id.* at 565–66 (citing *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812 (2000)). "Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Id.* at 566. The same is true here: when government targets speakers or the messages that those speakers convey for disfavored treatment, courts should apply strict scrutiny when examining such behavior.

In *Sorrell*, the government argued that it was only imposing an "incidental burden on protected speech," but this Court rejected that: it found that such government action does "not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers." *Id* at 567. In the case at hand, the government didn't even try to hide that it was specifically targeting the NRA for its speech.

The highest officer of the state, Governor Andrew Cuomo, explicitly described the objective of New York's regulatory actions is: "The regulations NY put in place are working. We're forcing the NRA into financial jeopardy. We won't stop until we shut them down." Andrew Cuomo (@andrewcuomo), Twitter (August 3, 2018, 2:57 PM), https://twitter.com/andrewcuomo/status/1025455632755908608. He then linked to a news story that described the efforts of New York financial regulators to end sales of NRA-branded insurance policies. Tim Dickinson, *The NRA Says It's in Deep Financial Trouble, May Be 'Unable to Exist'*, Rolling Stone (August 3, 2018), https://www.rollingstone.com/politics/politics-news/nra-financial-trouble-706371/.

This Court should understand Governor Cuomo's statements as admissions that the government was "forcing" Petitioner into "financial jeopardy" so as to make it "shut down." Such adverse government action burdens speech that is protected by the First Amendment and operates as viewpoint discrimination.

II. RESPONDENT IS NOT ALONE IN ITS VIOLATION OF PROTECTED SPEECH BY USING THREATS TO THIRD PARTIES

A. JAWBONING BEFORE THE 21ST CENTURY

The government's use of threats and intimidation to silence speakers has metastasized over time. Jawboning is pervasive today. But we should also remember that there were many times in the past that this destructive practice has left its mark on American history.

The term may have its origins in the activities of the World War II Office of Price Administration and Civilian Supply; John Kenneth Galbraith wrote about that office that "legislative authority was lacking, and only verbal condemnation could be visited on violators … to describe such oral punishment, the word jawboning entered the language." J. K. Galbraith, *Money: Whence It Came, Where It Went*, 239 (1976).

The practice became more notorious under the aggressive measures of the Kennedy administration to force steel prices lower, which included public denunciations of steel companies, an antitrust investigation, the summoning of a federal grand jury, and FBI investigators fanning out to steel executives' offices and homes. Carl W. Hittinger and Tyson Y. Herrold, *Presidential Powers and Antitrust* 2 (July 28, 2017), https://www.bakerlaw.com/webfiles/Litigation/2017/Articles/07-31-2017-Hittinger-Herrold-

LegalIntell.pdf. President Kennedy also directed the Defense Department to shift steel purchases away from the companies he believed had executed a "double-cross" against him so as to do with business with more compliant firms. *Id*. at 2. Ultimately, the steel companies backed down. *Id*.

This anecdote is especially notable because it illuminates jawboning's status quo: that is, the relative powerlessness of private interests to resist the pressures that a determined exercise of jawboning can exploit. Most who are subject to jawboning lack the powers of U.S. Steel to fight back. As a practical matter, those who would prefer to vindicate their rights often must decline, once they take into account the unpleasant consequences of angering government officials. When the line between use and misuse of government powers is unclear, that murkiness invites increased misuse of those powers by unscrupulous public officials.

Consider the blacklist first promulgated by the Truman administration: the Attorney General's List of Subversive Organizations. 13 Fed. Reg. 1473 (1948). Organizations were placed on this list without any hearing, formal process, or avenue of appeal. Robert Justin Goldstein, *Prelude to McCarthyism: Th e Making of a Blacklist*, Prologue Magazine, Vol. 38, No. 3 (Fall 2006), https://www.archives.gov/publicatio ns/prologue/2006/fall/agloso.html. Those affiliated with suspect organizations, or in some cases those who merely had friends with such affiliations, were banned or fired from federal employment. David Schultz, *Attorney General's List of Subversive Organizations*,

The First Amendment Encyclopedia (2009), https://www.mtsu.edu/first-amendment/article/856/attorney-general-s-list-of-subversive-organizations. Many years later, some architects of that list regretted the lawlessness of its operation, Goldstein, *supra* at 6, but such regret about that list was likely of little comfort to those injured by it.

In short, although this collection of anecdotes focuses on the present era, we must underscore that jawboning is far from a new presence in American governance.

B. 21ST-CENTURY JAWBONING AS DIRECTED AT PARTICULAR BUSINESSES OR BUSINESS SECTORS

Just below, we describe several instances of jawboning directed at various economic sectors today. We do this to show that the incidence of jawboning has metastasized.

- *Regulation via intimidation and quasi-boycott of the food and drug industry*. The Food and Drug Administration "routinely issues 'warning letters' that allege some regulatory infraction and provide the recipient with a limited period of time to take corrective action." Lars Noah, *Governance by the Backdoor: Administrative Law(lessness?) at the FDA*, 93 Neb. L. Rev. 89, 126 (2014). Such actions are sometimes coupled with instructions from the FDA to other government bodies "to stop dealing with the firm in the meantime." *Id*. Few manufacturing

firms could weather being targeted this way: such instructions must be understood in the context of the federal government's quasi-monopsonist purchasing power. *Id.* Most companies that face the harrowing choice of fighting the agency (and thus jeopardizing their markets) or acceding to the agency's desires must opt for the latter.

- *Deference from financial services resulting from government intimation and intimidation.* When the State Department sent a letter to PayPal explaining that Wikileaks' activities were illegal in the United States, PayPal responded almost immediately by suspending Wikileaks' account. Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle Over the Soul of the Networked Fourth Estate*, 46 Harv. C.R.-C.L. L. Rev. 311, 341 (2011). Visa, MasterCard, and Bank of America rapidly followed suit. *Id.* at 341-42. But that letter from the State Department only charged that information was provided illegally to Wikileaks, not that Wikileaks had acted illegally. *Id.*

  Nonetheless, it is difficult to avoid the conclusion that PayPal, and its fellow financial services companies, were simply carrying out the course of action that the government had signaled that it wanted. Normally, the use of a conventional legal process aimed at cutting access to payment systems based on government objections to content would, at best, move slowly and face extraordinary and

perhaps insuperable barriers. But what was essentially a forced public-private partnership, combined with suggestive rhetoric from the government about bad behavior by private parties, accomplished rapidly what the conventional legal process could only do very slowly.

- *Federal pressure exerted against Internet service providers (ISPs).* Jawboning directed against ISPs is a bipartisan phenomenon. The Bush Administration issued "threats" against ISPs to force them into adopting preferred data retention policies. Derek E. Bambauer, *Against Jawboning*, 100 Minn. L. Rev. 51, 71 (2015). The Obama Administration pressured ISPs by raising the prospect of "legislation that would mandate termination of the accounts of users accused of intellectual property infringement and also blocking of infringing content itself, as a cudgel to press providers to agree to implement these measures voluntarily." Derek E. Bambauer, *Orwell's Armchair*, 79 Univ. of Chicago L. Rev. 863, 896 (2012).
- *Federal pressure exerted on telecommunications firms.* Former Federal Communications Commission chairman chair Michael Powell appears to have relied on his own personal authority to issue an edict against a company "without any rulemaking whatsoever." Jerry Brito, *"Agency Threats" and the Rule of Law: An Offer You Can't Refuse*, 37 Harv. J. L. & Pub. Pol'y 554, 556 (2012). Shortly after Powell instructed the industry to change its conduct

(and, more precisely, to—among other things—avoid blocking voice-over-Internet applications) "the FCC's Enforcement Bureau opened an investigation into Madison River Communications, a small telephone company that was allegedly acting in contravention of Powell's instructions." *Id.* at 557. The Commission quickly settled after extracting a $15,000 payment; "it is widely understood that the Madison River case was a de facto enforcement of Chairman Powell's … edict." *Id.* n.18. Other commentators noted that the FCC lacked the statutory authority to issue the kind of regulations that the Powell edict implied—a judgment confirmed by at least one court ruling. *Verizon Communications Inc. v. Federal Communications Commission*, 740 F.3d 623 (D.C. Cir., 2014).

- *Government stigmatization of law firms and their clients.* After the House of Representatives decided to sue the Obama Administration in 2014 over its implementation of the Affordable Care Act, the House's top lawyer chose Baker Hostetler to try the case. Josh Blackman, *Unraveled: Obamacare, Religious Liberty, and Executive Power* 356 (2016). Less than "a week after the contract was announced, partners at the firm started to receive urgent calls from general counsels of clients within the health industry." *Id.* At least one of those general counsels "confirmed … that the Obama Administration was quietly pushing health care companies to drop Baker Hostetler." *Id.*

Eventually, the Administration's campaign of behind-the-scenes pressure was successful: Baker Hostetler withdrew. *Id*. The use of soft pressure by the federal government to discourage attorney-client relationships might reasonably be predicted to have a variety of deleterious effects on the American justice system.

- *Informal regulation of disfavored toys.* After the Consumer Product Safety Commission decided that toys containing a set of small but powerful rare earth magnets were dangerous, it then chose to skip the standard notice-and-comment process; instead, it issued a fusillade of threatening letters demanding that the toys be banished from consumer markets. Jerry Brito, "*Agency Threats" and the Rule of Law: An Offer You Can't Refuse*, 37 Harv. J.L. & Pub. Pol'y 553, 573 (2014). The Commission sent letters to companies demanding that they cease selling the toys immediately; it also gave "retailers forty-eight hours to inform the government whether they would comply, implying a threat." *Id*. This created a dramatic reversal of fortune for the toy manufacturer, whose product had once been named "Toy of the Year"; ultimately, the Commission's threats drove the toy manufacturer out of business. *Id*.

C. 21ST-Century jawboning as directed at electronic communications

In the 21st century, social media has created new and increasingly popular dimensions of speech that

are largely free of gatekeepers. One unhealthy reaction to the viewpoint diversity in these largely unregulated public squares is the reaction of some government officials, who respond with attempts to govern and tamp down speech.

- *Government targeting of social media firms.* During the Covid pandemic, the White House told Twitter and Facebook that they should eliminate "misinformation" on their platforms. Genevieve Lakier, *Informal Government Coercion and The Problem of "Jawboning"*, Lawfare (July 16, 2021), https://www.lawfareblog.com/informal-government-coercion-and-problem-jawboning. Such commands were accompanied by immoderate claims from President Biden himself that Facebook was "killing people." Zolan Kanno-Youngs and Cecilia Kang, *"They're Killing People': Biden Denounces Social Media for Virus Disinformation*, New York Times (July 17, 2021). The United States Surgeon General issued eight health-related anti-misinformation guidelines for social media firms. U.S. Surgeon General, *Confronting Health Misinformation: The U.S. Surgeon General's Advisory on Building a Healthy Information Environment*, Department of Health and Human Services (July 15, 2021), https://www.hhs.gov/sites/default/files/surgeon-general-misinformation-advisory.pdf. The President's communications director then suggested that a failure to comply with those guidelines might lead to the elimination of Section 230 provisions that protect social media firms.

Biden Will Make Every Effort to Convince Americans to Get Vaccinated: WH, Morning Joe, MSNBC (July 20, 2021), https://www.msnbc.com/morning-joe/watch/biden-will-make-every-effort-to-convince-americans-to-get-vaccinated-wh-117059141549. Twitter rapidly acceded to these threats: just "four hours after Biden accused social media companies of killing people, Twitter suspended [Alex] Berenson's account." Robby Soave, *How the CDC Became the Speech Police*, Reason (Mar. 2023), https://reason.com/2023/01/19/how-the-cdc-became-the-speech-police/. Alex Berenson, a former *New York Times* reporter, had become increasingly critical of the Covid vaccines on Twitter; despite previous assurances to Berenson that the company "respected public debate," Twitter reversed course immediately after the White House made its preferences known. *Id.*

- *Pressure from the government to regulate online discussion of domestic politics and foreign enemies.* In 2020, Twitter banned the *New York Post's* Twitter account; Facebook limited the sharing of the *Post's* reports about Hunter Biden's laptop. Ken Klippenstein & Kee Fang, *Truth Cops: Leaked Documents Outline DHS's Plans to Police Disinformation* (Oct. 31, 2022), https://theintercept.com/2022/10/31/social-media-disinformation-dhs/. Mark Zuckerberg eventually revealed the precursor to Facebook's decision: Facebook's decision to tamp the story down occurred "after a conversation with the FBI." *Id.*

It is no exaggeration to say that federal pressure on platform providers that they should themselves regulate controversial stories can result in censorship. Similarly, the FBI has convinced social media firms to monitor and regulate online content related to ISIS, even though direct censorship of the content of online speech would be unambiguously unconstitutional. Aaron Mackey & Amul Kalia, *Companies Should Resist Government Pressure and Stand Up for Free Speech*, Electronic Frontier Foundation (Jan. 13, 2016), https://www.eff.org/deeplinks/2016/01/companies-should-resist-government-pressure-and-stand-free-speech. In other words, public officials "are now both subtly and not-so-subtly pressuring companies to achieve a result that the First Amendment prevents them from doing themselves." *Id.*

- *Congressional jawboning.* In a recent report, analyst Will Duffield compiled 62 separate instances of congressional jawboning directed towards social media firms, most of them occurring in the context of eight legislative hearings that took place over the last four years. Will Duffield, *Jawboning against Speech* (Sept. 12, 2022), https://www.cato.org/sites/cato.org/files/2022-09/policy-analysis-934-annex.pdf. Notably, much congressional jawboning would be shielded from liability by the Constitution's Speech or Debate Clause. U.S. Const. Art. I, Sec. 6, Cl. 1.

Nonetheless, these instances of jawboning probably

are best understood as attempts to tell particular private-sector persons and firms what to do—an endeavor that is in some tension with Congress's fundamental legislative duty to issue generally applicable rules.

- Some instances of congressional jawboning consist of leading questions, and one could reasonably infer that such questions are intended to imply a recommended course of action. For instance, in a hearing where he questioned YouTube representatives, Rep. Ted Deutsch asked, "You recently decided not to ban Infowars. Can you explain that decision?" *Facebook, Google and Twitter: Examining the Content Filtering Practices of Social Media Giants, Hearing Before the Committee on the Judiciary*, 115th Cong., 2nd Sess. (July 17, 2018). In another hearing, shortly before the 2020 elections, Sen. Tim Scott asked Twitter representatives: "Tell me why you flag conservatives in America, like President Trump … while allowing dictators to spew their propaganda on your platform." Rev, *Tech CEOs Senate Testimony Transcript October 28* (Oct. 28, 2020), https://www.rev.com/blog/transcripts/tech-ceos-senate-testimony-transcript-october-28.

  Perhaps the nadir of such congressional leading questions was posed by Sen. Marsha Blackburn, who asked the head of Google about the employment status of a software engineer there who had criticized her in leaked, previously private emails. "He has had very unkind things

to say about me," Blackburn noted, "and I was just wondering if you all had still kept him working there." *Id*.

- Other instances of congressional jawboning consist of less ambiguous requests, such as asking for commitments to take certain actions. For instance, just weeks before the 2020 election, Sen. Ed Markey asked the head of Facebook to agree to pause all of its recommendations: "Mr. Zuckerberg, will you commit to stopping all group recommendations on your platform until U.S. election results are certified? Yes or no?" *Id*. Similarly, Sen. Patrick Leahy asked Facebook to commit moderation resources to scrubbing its platform of hate speech in Myanmar: "Will you dedicate resources to make sure such hate speech is taken down within 24 hours?" Washington Post, Transcript of Mark Zuckerberg's Senate hearing (Apr. 10, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/04/10/transcript-of-mark-zuckerbergs-senate-hearing/.
- And other instances of congressional jawboning consist of relatively unambiguous charges of illegality or threats to take legislative action. For instance, Sen. Dianne Feinstein lectured social media executives that "You've created these platforms and now they are being misused, and you have to be the ones to do something about it, or we will." *Social Media Influence in the 2016 U.S. Election, Hearing Before the Select Committee on Intelligence*, U.S.

Senate, 115th Cong., 1st Sess. (November 1, 2017). Sen. Bob Menendez sent Twitter CEO Jack Dorsey a letter which charged that Twitter would be violating a court order unless it immediately removed links to electronic blueprints for 3D-printed guns from its platform—even though the court order Menendez cited didn't apply to Twitter. Sen. Robert Menendez, Letter to Jack Dorsey (March 7, 2019), https://www.menendez.senate.gov/imo/media/doc/Twitter%20Letter%203D%20guns%203.7.pdf.

D. 21ST-CENTURY JAWBONING AS MISSION AND SELF-JUSTIFYING GOAL, NOT JUST AS INSTRUMENTAL TACTIC

Last year, leaked documents revealed a Department of Homeland Security plan to "target inaccurate information on a wide range of topics, including … racial justice, U.S. withdrawal from Afghanistan, and the nature of U.S. support in Ukraine." Ken Klippenstein, *supra* at 13. The stated role of DHS's Disinformation Governance Board (now disbanded) was to submit guidance to DHS officials that explained how government agencies should respond to misinformation and disinformation. Steven Lee Myers and Zolan Kanno-Youngs, *Partisan Fight Breaks Out Over New Disinformation* Board, New York Times (May 2, 2022), https://www.nytimes.com/2022/05/02/technology/partisan-dhs-disinformation-board.html.

One might anticipate extraordinary and categorical difficulties with this endeavor, given the challenges of distinguishing between factual propositions (on the one hand) and expressions of opinion (on the other) that are often mixed together in texts—as well as the problem of federal employees whose political opinions might play a part in the determination of what constitutes dangerous speech. Those difficulties were typified by certain statements from the head of the Disinformation Governance Board, Nina Jankowicz, who notoriously argued that it was imperative to understand Hunter Biden's laptop as a "Trump campaign product." Darragh Roche, *Disinformation Head Nina Jankowicz Addresses Hunter Biden Laptop Remarks*, Newsweek (April 28, 2022), https://www.newsweek.com/disinformation-head-nina-jankowicz-hunter-biden-laptop-remarks-1701654.

In both the Trump Administration and the Biden Administration, "tech companies including Twitter, Facebook, Reddit, Discord, Wikipedia, Microsoft, LinkedIn, and Verizon Media met on a monthly basis with the FBI … to discuss how firms would handle misinformation during the election." Ken Klippenstein, *supra* at 13.

The Disinformation Governance Board is far from the only government operation which used jawboning as its central mechanism. Operation Choke Point was a less recent initiative whose force and operation rested almost entirely on jawboning. Iain Murray, *Operation Choke Point: What It Is and Why It Matters* (July 2014), http://cei.org/sites/default/files/Iain%20Murray%20-%20Operation%20Choke%20Point.pdf. The

origins of Operation Choke Point rest in a 2011 FDIC circular that alleged increased "risk" in relationships between banks and third-party payment processors, including "greater strategic, credit, compliance, transaction, legal, and reputation risk." *Id.* at 1. That circular explained how certain industries appeared to be at relatively greater risk of fraud; it provided an extensive list of "high-risk" businesses which indiscriminately contained both criminal enterprises ("Ponzi schemes," "debt consolidation scams," etc.) and conventional businesses such as ammunition sales, coin dealers, fireworks sales, and tobacco sales. *Id.* at 7. The circular recommended that banks should carry out an extensive list of due-diligence activities that focused on processors with clients in "high-risk" industries, including detailed examination of those processors' business methods; furthermore, it required banks to keep dossiers on the processors' clients. *Id* at 8.

The multi-agency task force that comprised Operation Choke Point, led by the Department of Justice, then attempted to crack down on these politically disfavored firms by targeting their access to American financial systems. *Id.* at 1. Part of Operation Choke Point's modus operandi was to issue subpoenas, or make threats of subpoenas, that would significantly increase banks' burdens of regulatory compliance. *Id.* at 23.

In effect, Operation Choke Point forced banks to serve as regulatory partners—or, perhaps, involuntary deputies—who had to bear greater responsibility for choosing to serve disfavored clients

or working with the payment processors who served them. *Id*. At least one leader of Operation Choke Point was explicit about the efficiencies of shifting enforcement costs to private parties: in a letter to other coalition members, Assistant U.S. Attorney Joel Sweet explained that requiring banks to scrutinize payment processors more extensively "can yield almost immediate prospective protection of the public at an extremely low cost." *Id.* at 9.

Even if concerns about private-sector commandeering are ignored, it is now widely conceded that Operation Choke Point had broad, detrimental effects on the nation's economy—largely because of the predictable impact of the denial of banking services to firms engaged in lawful businesses.

* * *

In short, jawboning has become more pervasive and more dangerous. Indeed, multiple social trends suggest that there is plenty of room for jawboning's ambit to increase: the growth of government power and government itself, as well as what appears to be growing acceptance of the practice of jawboning in our political culture, seem to fertilize the soil that allows jawboning to continue to flower.

In the case at hand, the court below appears to have ignored the multiple indicia of jawboning that Petitioner presented to it. Indeed, the court below appears to have misunderstood the many red flags that Respondent's jawboning created—indicia of

jawboning that appeared evident to many others in the account that Respondent has presented.

Our goal here is to demonstrate the pervasiveness of jawboning itself and to demonstrate the multitude of instances in which those red flags show up over and over again. More generally, when circumstances demonstrate that government communications are not merely the expression of opinion but has become an exercise in intimidation, such communications can violate the rights of others. In short, because the exercise of jawboning so often implies the abuse of power or the exercise of extra-constitutional powers, it is important to end this sordid practice.

CONCLUSION

For the foregoing reasons, this Court should overturn the lower court and hold that New York did coerce the Plaintiff's in the exercise of their First Amendment protected speech.

Respectfully submitted,

Devin Watkins
Counsel of Record
Dan Greenberg
COMPETITIVE ENTERPRISE INSTITUTE
1310 L St. NW, 7th Floor
Washington, D.C. 20005
(202) 331-1010
Devin.Watkins@cei.org
Dan.Greenberg@cei.org
Attorneys for Amicus Curiae

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