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 FOR FIRST AMENDMENT SCHOLARS AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE[*]

Amici are scholars who write and teach about the First Amendment and thus have an interest in the sound development of doctrine in this area. Although many of the *amici* disagree with the National Rifle Association's (NRA) positions on gun policy, *amici* agree that the First Amendment prohibits the government from using the threat of legal sanctions to thwart the NRA's advocacy.

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[*] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

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SUMMARY OF ARGUMENT

In the sixty years since this Court decided *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), lower courts have, at times, struggled to define the line between permissible government speech and impermissible coercion. The facts of this case require no such struggle. The actions of Respondent, Maria Vullo, crossed every recognized line by a country mile.

Here, Vullo, a state official, sought to punish the NRA for its speech, threatening insurance companies with legal sanctions unless they ended their business dealings with the NRA. That conduct plainly constitutes impermissible government coercion under a straightforward application of *Bantam Books*. In *Bantam Books*, this Court held that government officials may not threaten an intermediary with legal sanctions to silence a speaker's disfavored message. Yet that is precisely what Vullo did when she promised to forego enforcement actions against insurance companies that ceased doing business with the NRA, implying that she would bring enforcement actions against companies that continued to work with the NRA.

Lower-court cases applying *Bantam Books* sometimes use different tests to identify coercion, but they all point in the same direction: Whenever the government threatens legal sanctions to silence disfavored speech, the government crosses the line from permissible persuasion to unlawful coercion. To be sure, the First Amendment protects government officials who express their own views on public affairs, including condemning conduct and actors with whom they disagree. Legitimate government speech often fosters the First Amendment ideals of open dialogue and the free marketplace of ideas. Holding government officials liable when they make sanctions-backed threats to silence other speakers is consistent with those ideals and does not risk chilling permissible government speech because the government has no First Amendment interest in making such threats. This Court and lower courts have recognized that although the First Amendment permits the government wide latitude to speak on matters of public concern, government officials may not use the threat of punishment to coerce conformity with their views. This Court's longstanding prohibition on using sanctions-backed threats to silence speech appropriately respects both government and private First Amendment rights.

Permitting Vullo's sanctions-backed threats in this case would provide the government the means to punish any speech with which it disagrees or views as politically unpopular. In one state, it may be the NRA. In another, it might be Moms Demand Action for Gun Sense in America. It could be Black Lives Matter or the National Right to Life Committee. The list of potential targets is endless. And as different as those targets may be, the First Amendment protects each of them from government-compelled blacklisting based on their advocacy.

ARGUMENT

This Court has long recognized that freedom of speech is "vulnerable to gravely damaging yet barely visible encroachments." *Bantam Books*, 372 U.S. at 66. This case demonstrates the truth of that concern. During a series of private meetings, Maria Vullo, a New York state regulator, offered insurance companies a choice: Drop the NRA or face civil enforcement actions for "an array of technical regulatory infractions." Pet.App.199-200, 223. The insurance companies, including Lloyd's of London, fell in line. Pet.App.200, 223-24. Then, Vullo obtained consent decrees which required firms to stop providing insurance services the NRA promoted. Pet.App.214, 218, 225, 306.

Make no mistake—Vullo targeted the NRA for its protected speech. Vullo effectively admitted as much by urging insurers to dump the NRA and "similar gun promotion organizations." Pet.App.248. Vullo was not seeking to impose some reasonable time, place, and manner restriction on disruptive speech—she was seeking to punish the NRA because of its message. That Vullo did so by targeting the NRA's business partners is no less a violation of the NRA's First Amendment rights than if Vullo acted against the NRA directly. Vullo's conduct was precisely the kind of "gravely damaging yet barely visible encroachment[]" on speech that violates the First Amendment. *See Bantam Books*, 372 U.S. at 66.

To decide this case, this Court need only apply the long-recognized principle that the government may not threaten legal sanctions to silence disfavored speakers. This Court need not decide the precise test delineating permissible government persuasion from impermissible government coercion. Though difficult line-drawing questions may arise at the margins, Vullo's threatened legal

sanctions were plainly coercive.

There is no risk that deciding this case for the NRA would chill permissible government speech because the government never has a First Amendment interest in using the threat of legal sanctions to silence speakers. But ruling for Vullo would invite government entities at every level to adopt similar policies targeting a wide range of expressive organizations whose views they oppose. This would include not only the NRA but also anti-abortion organizations, organizations that oppose gay rights, organizations that advocate in favor of tax reform, and on and on. The First Amendment prohibits all of this. No matter who the speakers are, the government cannot use the threat of legal sanctions to silence them.

I. A Straightforward Application of *Bantam Books* Decides the Question Presented

This Court need not break any new ground to decide the question presented. Rather, this Court should simply apply the rule from *Bantam Books*: A government official cannot use the threat of legal sanctions to punish a disfavored speaker, whether directly or by threatening an intermediary. *Id.* at 66-70.

In *Bantam Books*, this Court held that a state commission violated the First Amendment rights of book publishers by coercing bookstores to stop selling books the commission deemed "objectionable." *Id.* at 61-64. The commission sent a distributor notices that identified blacklisted books, reiterated the commission's "duty to recommend to the Attorney General prosecution of purveyors of obscenity," and informed the distributor that "lists of 'objectionable' publications" would be sent to local police departments for enforcement. *Id.* at 61-63, 62 n.5.

The notices were then "invariably followed up by police visitations." *Id.* at 68.

After receiving these notices, the distributor would reject pending book orders, refuse new ones, and round up unsold copies from retailers for return to the publishers. *Id.* at 63. The distributor preferred to cut book sales "rather than face the possibility of some sort of a court action." *Id.*

The commission argued that this system respected the First Amendment because the notices "simply exhort[ed] booksellers and advise[d] them of their legal rights." *Id.* at 66. This Court disagreed. "[L]ook[ing] through forms to the substance," this Court held that the commission was not providing advice but instead threatening legal sanctions. *Id.* at 67-69. Though the commission lacked the "power to apply formal legal sanctions," this Court recognized that "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around." *Id.* at 66-68.

Here, Vullo's actions were even more coercive than the commission's in *Bantam Books*. For one, unlike the commission, Vullo had the "power to apply formal legal sanctions." *See id.* at 66. Beyond the authority to refer matters for criminal prosecution, Vullo had "broad regulatory and enforcement powers," including "the ability to initiate civil and criminal investigations and enforcement actions." Pet.App.201-02. And Vullo openly wielded that power here, promising leniency to Lloyd's for alleged "technical regulatory infractions" if the company stopped doing business with the NRA. Pet.App.199-200, 223. As the Solicitor General recently acknowledged, that statement was equivalent to a threat: "[A]n alleged offer 'not

to prosecute [certain] violations' in exchange for compliance" is impermissible because "[t]he Constitution does not distinguish between 'comply or I'll prosecute' and 'comply and I'll look the other way.'" Pets. Br. 27, *Murthy v. Missouri* (No. 23-411) (second alteration in original) (citing Pet.App.48).

Vullo's threats were effective. Lloyd's quickly bowed to Vullo's demands—then reaped the promised reward when Vullo ignored Lloyd's regulatory infractions. Pet.App.223, 225. Vullo also entered into broad consent decrees with Lloyd's and other insurance companies that restricted their participation in "*any* affinity-type insurance program with the NRA," regardless of the programs' legality. Pet.App.214, 218, 225. Thus, Vullo did not just threaten Lloyd's—she obtained a judicially enforceable decree to prevent Lloyd's from changing its mind. Like the commission in *Bantam Books*, Vullo "succeeded in [her] aim" of penalizing disfavored speech. *See* 372 U.S. at 67.

The distinctions between *Bantam Books* and this case are immaterial to this analysis. First, the fact that Vullo threatened Lloyd's with civil sanctions, Pet.App.199-200, 223, rather than criminal sanctions, like in *Bantam Books*, 372 U.S. at 68, is of no moment. As *Bantam Books* explains, "the threat of invoking *legal* sanctions"—not just criminal sanctions—"amply demonstrates" coercion. 372 U.S. at 67 (emphasis added). In any case, "civil sanctions" are coercive too. *See Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Any "regulatory, proscriptive, or compulsory" "exercise of governmental power" can chill speech. *Laird v. Tatum*, 408 U.S. 1, 11 (1972).

Nor does it matter that the intermediary in *Bantam Books*—a book distributor—exercised First Amendment rights of its own. In *Bantam Books*, the publishers did

not sue as "mere proxies" of the distributors. 372 U.S. at 64 n.6. Rather, the publishers asserted that the government had violated their own rights—and this Court agreed. *Id.* Here, the NRA alleges a violation of its own First Amendment rights, just like the publishers in *Bantam Books*.

Third, that Vullo expressly threatened legal sanctions only in private conversations makes her threats more, not less, pernicious. Government officials cannot circumvent the First Amendment by waging a public campaign against a disfavored speaker while saving their most potent weapon—the threat of legal sanctions—for the back room. As this Court warned, even "barely visible encroachments" are "gravely damaging" to freedom of speech. *Id.* at 66.

Threatening businesses behind closed doors is an especially dangerous tool for suppressing speech. An informal threat, conveyed in private, prevents the public from using the normal check on government overreach: "the ballot box." *See Shurtleff v. City of Bos.*, 596 U.S. 243, 252 (2022). Plus, by targeting intermediaries, government officials can expand their regulatory jurisdiction to suppress the speech of organizations that they have no direct control over, without risking the backlash and exposure of directly threatening the speaker. For example, here, Vullo had no regulatory authority over the NRA, so she went after the NRA's business partners—insurance companies over which she did have authority. There was another benefit to Vullo's intermediary strategy too: Because intermediaries will often be less invested in the speaker's message and thus less likely to risk the regulator's ire, threats to intermediaries are more likely to silence speech. *See Backpage.com, LLC v. Dart*, 807 F.3d 229, 236 (7th Cir. 2015).

Vullo's final attempt to distinguish *Bantam Books*—on the ground that she was merely providing business advice, not threatening anyone—fails. *See* BIO 35. This Court rejected a nearly identical argument in *Bantam Books*. In this Court's words, "[i]t would be naive to credit the State's assertion" that its threats were "in the nature of mere legal advice, when they plainly serve as instruments of regulation." *See Bantam Books*, 372 U.S. at 68-69. That logic applies equally here. Even apart from *Bantam Books*, if insurance companies could be swayed by information about the reputational risks of partnering with the NRA, they likely "would have ceased doing business with [the NRA] years before." *See Backpage*, 807 F.3d at 237. But sophisticated insurance companies like Lloyd's did not drop the NRA years earlier. Lloyd's partnered with the NRA until Vullo threatened the company. This Court should reject Vullo's attempt to recharacterize her threats.

Though Vullo's title—Superintendent of the New York State Department of Financial Services—may be less Orwellian-sounding than the "Commission to Encourage Morality in Youth" from *Bantam Books*, 372 U.S. at 59, her tactics are the same. Vullo used the threat of legal sanctions to punish a disfavored speaker. No complex line-drawing or balancing is required to find such conduct unconstitutional. This Court need only apply *Bantam Books.*

II. Circuit Courts Applying *Bantam Books* Confirm that Sanctions-Backed Threats Violate the First Amendment

The leading lower-court cases applying *Bantam Books* differ in approaches. Some cases suggest that the government crosses the line only when it makes an explicit, sanctions-backed threat. *See, e.g.*, *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1016 (D.C. Cir. 1991). Other

cases suggest that the government crosses the line by making subtle or implicit threats. *See, e.g.*, *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003) (then-Judge Sotomayor on the panel). But whatever their differences, the leading lower-court cases all agree that, at a minimum, the First Amendment prohibits the government from making sanctions-backed threats to silence disfavored speech. Because this case involves just such a threat, this Court need not decide the precise test for when government speech is coercive enough to violate the First Amendment. To resolve the question presented, this Court need only confirm that sanctions-backed threats cross the line.

A. Courts that Find Coercion Agree that Sanctions-Backed Threats Violate the First Amendment

Judge Posner's opinion for the Seventh Circuit in *Backpage* is illustrative. There, the court held that a sheriff violated the First Amendment by "using the power of his office to threaten legal sanctions against … credit-card companies for facilitating future speech." *Backpage*, 807 F.3d at 231. Though the sheriff threatened credit-card companies, his true target was Backpage, a website for classified ads that included an "adult" section. *Id.* at 230. The sheriff tried to slash Backpage's revenue by forcing the credit-card companies to decline customers' ad purchases. *Id.* at 230-31.

To make his threats, the sheriff wrote the credit-card companies a letter. The letter denounced the companies' connections to "an industry that reaps its cash from the victimization of women and girls across the world" and reminded them of their legal obligation to report suspicions of human trafficking and sexual exploitation. *Id.* at 232. The letter also cited a federal money-laundering statute—intimating criminal liability—and made clear that the

sheriff would monitor the companies until their behavior changed. *Id.* In short, the sheriff impliedly threatened to "sic the feds" on the companies if they did not comply. *Id.* at 234.

No surprise, the threat worked: The credit-card companies severed their ties with Backpage shortly after receiving the letter. *Id.* at 232. The companies again proved *Bantam Books*' rule that "thinly veiled threats" can coerce involuntary participation in a speech-suppression campaign. 372 U.S. at 68. The court held that "by threatening that legal sanctions will … be imposed unless there is compliance with his demands," the sheriff violated Backpage's First Amendment rights. *Backpage*, 807 F.3d at 231.

Some courts have applied *Bantam Books* even more broadly. For example, in *Okwedy*, the Second Circuit emphasized that government officials violate the First Amendment by making threats even without the power to back them up. 333 F.3d at 340-41, 343-44. There, a borough president sought to suppress a religious group's anti-gay message, which the group paid to post on a company's billboards. *Id.* at 341. Rather than approaching the religious group, the borough president urged the billboard company to take down its signs, sending the company a letter "contain[ing] an implicit threat of retaliation if [the company] failed to accede to [his] requests" to get rid of its billboards. *Id.* at 344. The letter implied that the borough president "intended to use his official power to retaliate against [the company] if it did not respond positively to his entreaties." *Id.*

Even though the borough president could not directly impose legal sanctions on the billboard company, the Second Circuit nevertheless held that a jury could find this threatening letter violated the First Amendment. *Id.*

Like the Seventh Circuit in *Backpage*, the Second Circuit focused on the threat: "[A] public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights even if the public-official defendant lacks direct regulatory or decisionmaking authority over the plaintiff or a third party that facilitates the plaintiff's speech." *Id.* at 340-41, 344. The letter was coercive because its recipient "could reasonably have feared that [the borough president] would use whatever authority he does have" by virtue of his public office to punish it for non-compliance. *Id.* at 344. Although the threat was "implicit" and not clearly backed by legal sanctions, it nonetheless could "stifle protected speech." *Id.*

Both *Backpage* and *Okwedy* find a First Amendment violation under *Bantam Books* where the government makes threats against a speaker's intermediary—the credit-card companies that dealt with Backpage or the billboard company in *Okwedy*. A similar application of *Bantam Books* here yields the same result. If anything, this case is easier than *Backpage* and *Okwedy* because Vullo used her direct regulatory authority over Lloyd's. The sheriff in *Backpage* threatened prosecution by other agencies, and the borough president in *Okwedy* "lacked direct regulatory control" altogether. *Backpage*, 807 F.3d at 235; *Okwedy*, 333 F.3d at 344. By contrast, Vullo threatened to bring civil enforcement proceedings against Lloyd's herself. *See* Pet.App.199-202, 223. Thus, the threat here was more coercive than the threats in *Backpage* and *Okwedy*.

B. Even Courts that Find No Coercion Agree that Sanctions-Backed Threats Violate the First Amendment

Some courts take a narrower view of *Bantam Books*, but even these courts agree that sanctions-backed threats violate the First Amendment.

Take *R.C. Maxwell Co. v. Borough of New Hope*, 735 F.2d 85 (3d Cir. 1984). There, a borough council sought the removal of "unsightly billboards" by appealing to the owner of the land where the billboards were posted. *Id.* at 86. The court held that the council's letters, "politely but firmly" asking for the removal of the billboards, were not coercive. *Id.* at 86-87. One letter mentioned a draft zoning ordinance that would prohibit the billboards, but specified that the council sought voluntary compliance instead of "seeking legal remedies." *Id.* at 86 & n.2.

The Third Circuit reasoned that "[t]he quantum of governmental authority brought to bear" against the landlord was "far less" than the booksellers faced in *Bantam Books*. *Id.* at 88. The council could not have threatened the landlord under existing law, because it "brandish[ed] nothing more serious than civil or administrative proceedings under a zoning ordinance not yet drafted." *Id.* The council's letters, "devoid as they were of any enforceable threats, amounted to nothing more than a collective expression of the local community's distaste for the billboards." *Id.* at 89. The landlord, concerned with its "image[] in the community," willingly complied. *Id.*

The absence of sanctions-backed threats also explains the D.C. Circuit's decision in *Penthouse*. In that case, the D.C. Circuit held that an advisory commission's promise to name and shame alleged pornography sellers in a report was not coercive. *Penthouse*, 939 F.2d at 1013-15. One recipient of the commission's letter "decided to stop

selling adult magazines in light of the public concern about the effects of pornography" and asked to be deleted from the report. *Id.* at 1013. The recipient feared that "the resulting publicity would be embarrassing." *Id.* The court concluded that a threat of negative publicity—rather than legal sanctions—did not amount to coercion. *See id.* at 1015. Compared to the commission in *Bantam Books*, the advisory commission "had no equivalent tie to prosecutorial power nor authority to censor publications." *Id.* The commission's letter "contained no threat to prosecute, nor intimation of intent to proscribe the distribution of the publications." *Id.*

The D.C. Circuit found further support in this Court's precedents, which have "never found a government abridgement of First Amendment rights in the absence of some actual or threatened imposition of governmental power or sanction." *Id.* According to the D.C. Circuit, a threat only becomes coercive if it is tied to a sanction—"criminal or otherwise." *Id.* at 1016. "[W]hen the government threatens no sanction … the government's criticism or effort to embarrass" likely does not "threaten[] anyone's First Amendment rights." *Id.*

Likewise, in *VDARE Foundation v. City of Colorado Springs*, the Tenth Circuit held that a City's public promise that it would not provide "any municipal resources or support" for an anti-immigration group's event at a private resort was not coercive. 11 F.4th 1151, 1157, 1164 (10th Cir. 2021). The Tenth Circuit rejected the group's attempted analogy to *Bantam Books*, noting that "nothing in the City's Statement plausibly threatens the Resort with legal sanctions." *Id.* at 1164. In fact, the statement expressly cautioned that the City lacked authority "to direct private businesses … as to which events they may host." *Id.* at 1157, 1164. The letter contained no threat at

all, let alone a threat of criminal prosecution or other legal sanctions. *See id.* at 1164-68. The City's mention of Colorado's anti-discrimination law was not a "thinly-veiled threat to prosecute" those who cooperated with the anti-immigration group because the reference was detached from any direct warning or threat. *Id.* at 1165.

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Despite their differing approaches, the lower courts applying *Bantam Books* agree on a core principle: Threatening intermediaries with legal sanctions to suppress a speaker's message violates the First Amendment. Vullo's threats plainly violated that basic rule.

III. The Government Has No First Amendment Interest in Threatening Legal Sanctions for Protected Speech

The core principle of *Bantam Books*—that the government may not use sanctions-backed threats to silence speech—safeguards both private and legitimate government speech. In a representative democracy, the government must have broad latitude to speak and "select the views that it wants to express." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009). The Free Speech Clause reflects the framers' understanding that "we may test and improve our own thinking both as individuals and as a Nation" "[b]y allowing all views to flourish," including the government's. *See 303 Creative LLC v. Elenis*, 600 U.S. 570, 584 (2023). But when government officials threaten legal sanctions to suppress a disfavored message, they impair the free exchange of ideas that the First Amendment is designed to protect.

Bantam Books is an outgrowth of that principle. While the line between protected government persuasion and government efforts to control private speech may be hard to draw at the margins, *Bantam Books* recognizes that the government has no First Amendment interest in

using sanctions-backed threats to silence disfavored speech. *See* 372 U.S. at 68-69. Circuit courts applying *Bantam Books* have repeatedly recognized this principle too. "A government entity … is entitled to say what it wants to say—but only within limits. It is not permitted to employ threats to squelch the free speech of private citizens." *Backpage*, 807 F.3d at 235; *accord VDARE*, 11 F.4th at 1171-72; *Penthouse*, 939 F.2d at 1015-16.

The same government-speech concerns often surface in First Amendment retaliation cases. *See, e.g.*, *Hous. Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 478 (2022). In that context, even the cases espousing the most robust view of permissible government speech prevent the government from using "a threat, coercion, or intimidation intimating that punishment, sanction, or adverse regulatory action will imminently follow." *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 687 (4th Cir. 2000).[1]

This Court need not decide whether other forms of government action, short of sanctions-backed threats, violate the First Amendment. Discerning a test for impermissible government coercion that "strikes the right balance under the First Amendment" in all cases is a "difficult question." *Echols v. Lawton*, 913 F.3d 1313, 1320 (11th Cir. 2019). Whether other kinds of government conduct are impermissibly coercive or not, sanctions-backed threats to discourage protected private speech plainly violate the First Amendment, as this Court held in *Bantam Books*. Applying that principle resolves the question presented.

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[1] *Accord Goldstein v. Galvin*, 719 F.3d 16, 30 (1st Cir. 2013); *Mirabella v. Villard*, 853 F.3d 641, 651 (3d Cir. 2017); *Hutchins v. Clarke*, 661 F.3d 947, 956-57 (7th Cir. 2011); *Mulligan v. Nichols*, 835 F.3d 983, 990 (9th Cir. 2016).

This Court has often taken a similarly cautious case-by-case approach to deciding First Amendment issues. For instance, in *Houston Community College*, this Court noted that "lower courts have taken various approaches" to assess whether the government has taken a material adverse action against a speaker, but declined to adopt a particular approach because whichever "lens[]" the Court used, there was no material adverse action on the facts. 595 U.S. at 477-78. That approach would make sense here, given the starkness of Vullo's threats against the NRA's business partners.

IV. Speakers Should Not Be Left Defenseless Against Sanctions-Backed Threats

Policing the line between government persuasion and coercion—and imposing First Amendment liability when officials cross the line—is vital to preserving healthy public discourse. Without robust protection against government coercion, officials could freely use backroom threats to silence critics, political opponents, or disfavored speakers. If Vullo's tactics were permitted, there would be nothing to stop a regulator with different politics from targeting the very same gun-control advocacy groups that encouraged Vullo's actions against the NRA here. Indeed, the next victim of regulatory retribution could be any organization with a message. Regulators in red states could penalize those who do business with advocacy groups with which they disagree: the Center for Reproductive Rights, the Human Rights Campaign, or Black Lives Matter. Regulators in blue states could target associates of groups that advocate positions they oppose: the American Enterprise Institute, the American Family Association, or even the Catholic Church. No matter the target of government coercion, freedom of speech suffers.

Most of the *amici* disagree with the NRA's political positions. But free speech is bigger than political differences. The government may not coerce private entities to disassociate from speakers the government disagrees with.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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