No. 22-842

In the Supreme Court of the United States

THE NATIONAL RIFLE ASSOCIATION OF AMERICA,

Petitioner,

v.

MARIA T. VULLO, BOTH INDIVIDUALLY AND IN HER FORMER OFFICIAL CAPACITY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION FOR GUN RIGHTS & NATIONAL FOUNDATION FOR GUN RIGHTS IN SUPPORT OF PETITIONER

DAVID A. WARRINGTON
Counsel of Record
GARY M. LAWKOWSKI
DHILLON LAW GROUP INC.
2121 Eisenhower Ave.
Suite 608
Alexandria, VA 22314
(703) 574-1206
dwarrington@dhillonlaw.com
glawkowski@dhillonlaw.com

JOSIAH CONTARINO
ANTHONY J. FUSARO, JR.
DHILLON LAW GROUP INC.
50 Park Pl.
Suite 1105
Newark, NJ 07102
(917) 423-7221
jcontarino@dhillonlaw.com
afusaro@dhillonlaw.com

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE [1]

Amicus Curiae National Association for Gun Rights, Inc. ("NAGR") is a non-profit social welfare organization exempt from income tax operating under IRC § 501(c)(4). NAGR was established to inform the

1 Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than amici curiae, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

public on matters related to the Second Amendment, including publicizing the related voting records and public positions of elected officials. NAGR encourages and assists Americans in public participation and communications with elected officials and policy makers to promote and protect the right to keep and bear arms through the legislative and public policy process.

Amicus Curiae National Foundation for Gun Rights, Inc. ("NFGR") is a non-profit organization exempt from income tax under IRC 501(c)(3). NFGR is the legal wing of the NAGR and exists to defend the Second Amendment in the court system.

SUMMARY OF THE ARGUMENT

The First Amendment protects the free speech and associational rights of the American people from encroachment by the government. It does not allow state actors to use threats to pressure private citizens into treating disfavored groups as *persona non grata.*

In framing this case, the Second Circuit looked to the government speech doctrine. The government speech doctrine emerged as a way to distinguish between when the government was speaking as a participant in the marketplace of ideas and when speech with some government nexus was properly attributable to private parties. As such, it is properly viewed as a way to sort out *who* is speaking. It does not alter the fundamental principles of *what* they may say or give license to the government to tread upon the association rights of individuals and entities. The government is big enough to look out for itself and does not need a "free speech right" to protect its own interests, nor is one created by the government speech doctrine.

The Court should take this opportunity to clarify that the government speech doctrine does not create a separate set of "free speech rights" to be balanced against those of private speakers. Instead, the Court should adopt a two-part test to assess government speech claims that focuses on whether the speech in question is a purposeful communication on behalf of the government and whether the speech targets private actors for hostile treatment based on the views they express.

When viewed through this lens, it is apparent that Respondent transgressed clearly established First Amendment lines. Respondent's "speech" is little more than a thinly veiled threat to wield government authority against insurance provides if they do not adopt Respondent's preferred policy outcomes, effectively telling insurance providers "that's a nice business you've got there, it would be a real shame if something happened to it." This is properly understood as an infringement upon the associational rights of Petitioner and those wishing to do business with the Petition that violates the First Amendment.

ARGUMENT

I. Respondents Have a Well-Established Right to Freedom of Association

Second Amendment rights—and advocating for those rights—are not second-class rights. Respondent may disagree with the Second Amendment and the scope of the rights it protects, but that disagreement does not place those rights beyond the protection of the Constitution.

It is well established that the Constitution ensures individuals—like the Petitioners' members—have the right to associate with others to advance common beliefs and ideas. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958); U.S. Const. amend I.

When state action curtails that freedom to associate, it is "subject to the closest scrutiny." *Id.* at

460–61. This is so even when the state action "abridge[s] . . . such rights . . . uninten[tionally]," or when it "appear[s] to be totally unrelated to protected liberties." *Id.* at 461.

Such was the case in *Patterson*, in which the Court found unconstitutional a state court order compelling the NAACP to disclose its member list to the Alabama Attorney General. *Id.* at 452–53, 462–63. The Court reasoned that compelled disclosure of the member list would hurt the NAACP's ability to pursue collective advocacy, by inducing members to leave the NAACP and dissuading others from joining it. *Id.* at 462–63. This was an indirect attack on the NAACP's First Amendment rights.

In another case involving the NAACP, the Court held unconstitutional a Virginia statute regulating solicitation in the legal industry, because the statute infringed on the NAACP's freedoms of expression and association under the First and Fourteenth Amendments. *NAACP v. Button*, 371 U.S. 415, 428–29 (1963). Specifically, the Court stated that, in addition to "abstract discussion," the First Amendment "protects vigorous advocacy, certainly of lawful ends, against governmental intrusion"—vigorous advocacy that the Court considered a "form of political expression." *Id.* at 429 (citations omitted). "[O]rderly group activity," including from "minority, dissident groups," is constitutionally protected. *Id.* at 430, 431 (citation and internal quotation marks omitted).

This "Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). Activities such as "speech, assembly, petition for the redress of grievances, and the exercise of religion." *Ibid.* Freedom to associate for these purposes is "an indispensable means of preserving other individual liberties." *Ibid.*

And the "First Amendment's protection extends beyond the right to speak." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 68 (2006). It extends to those who associate "for the purpose of speaking, which [the Court has] termed a 'right of expressive association.'" *Id.* (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000)). This extension is necessary because speech is often more effective when it's combined "with the voices of others." *Id.*

Like many freedoms, expressive association "is not absolute." *Boy Scouts of Am.*, 530 U.S at 648. But state action that infringes upon it can be sustained only if it "serve[s] compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* (citation and internal quotation marks omitted).

II. The Background and Origin of the Government Speech Doctrine.

A. The Origin of the Government Speech Doctrine.

The government speech doctrine first emerged in the early 1990s as a mere recognition that, "[s]o long as it bases its actions on legitimate goals, [the] government may speak despite citizen disagreement with the content of its message." *Keller v. State Bar of California*, 496 U.S. 1, 10 (1990) (citation and internal quotation marks omitted). When this Court initially developed the government speech doctrine, its application was guided by three straightforward rationales. First, given the "countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves." *Keller*, 496 U.S. at 12.

Second, from a functionalist perspective, when the government does speak for itself, it cannot be expected to simultaneously advocate against itself. *See Matal v. Tam*, 582 U.S. 218, 234–35 (2017) (explaining that when the government produced posters promoting activities that supported the Second World War, "the First Amendment did not demand that the Government balance the message of these posters by producing and distributing posters encouraging Americans to refrain from engaging in these activities"); *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) ("When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not

constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism." (citation omitted)).

Third, as a logical extension of the first two rationales, this Court reasoned that the government must be free to disassociate itself from viewpoints that it does not wish to endorse.[2] *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 471 (2009) ("It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated.").

Applying these three principles in *Johanns*, this Court held, for the first time,[3] that the "[g]overnment's own speech . . . is exempt from First Amendment scrutiny." [4] *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005); *Summum*, 555 U.S. at 470 ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."). In the absence of First Amendment scrutiny, this Court has said that democratic accountability and other Constitutional provisions, such as the establishment clause, operate as restraints on the government speech doctrine. *See Summum*, 555 U.S. at 468–69 (citing *Bd. of Regents of*

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[2] *See* Daniel J. Hemel, Lisa Larrimore Ouellette, *Public Perceptions of Government Speech*, 2017 Sup. Ct. Rev. 33, 41–42 (2017).

[3] Michael Kang & Dr. Jacob Eisler, *Rethinking the Government Speech Doctrine, Post-Trump*, 2022 U. Ill. L. Rev. 1943 (2022).

[4] Erwin Chemerinsky, *Free Speech Dead Zones*, 2022 U. Ill. L. Rev. 1695, 1704 (2022).

U. of Wisconsin System v. Southworth, 529 U.S. 217, 235 (2000)).

In *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), this Court built upon its holding in *Johanns* and set forth three factors to guide the government speech doctrine analysis:

> [1] the history of the expression at issue;
>
> [2] the public's likely perception as to who (the government or a private person) is speaking; and
>
> [3] the extent to which the government has actively shaped or controlled the expression."

Shurtleff v. City of Boston, Massachusetts, 596 U.S. 243, 252 (2022) (citing *Walker*, 576 U.S. at 252).

B. The Government Speech Doctrine is Centered on Distinguishing "Government Speech" from "Private Speech."

For each of the cases discussed above that defined the contours of the government speech doctrine, the facts concerned a private individual or entity who sought to use government channels as a medium to publicly express the message of their choosing. *See Shurtleff*, 596 U.S. at 248 (organization sought to fly their Christian flag in front of city hall); *Matal*, 582 U.S. at 223 (band sought to trademark a derogatory band name with the Patent and Trademark Office); *Walker*, 576 U.S. at 203–04 (organization sought to create a state license plate design featuring the Confederate flag); *Summum*, 555

U.S. at 464 (organization sought to erect a monument in a city party).

None of these cases, however, involved the specific application of the government speech doctrine currently before the Court. Here, the issue is not whether the speech at issue is better characterized as private speech or government speech; rather, the issue is whether the government may use its speech to coerce private businesses to disassociate with political advocacy groups that the government disfavors. *See National Rifle Association of America v. Vullo*, 49 F.4th 700, 714–19 (2d Cir. 2022), *cert. granted in part*, 144 S. Ct. 375 (2023).

C. The Government Speech Doctrine has Been a Consistent Source of Concern.

Throughout this Court's jurisprudence on the government speech doctrine, Justices have expressed trepidation regarding the validity of its application in certain contexts and its potential to permit otherwise unconstitutional viewpoint discrimination. *See generally Matal*, 582 U.S. at 247–54 (Kennedy, J., concurring in part and concurring in the judgment); *Summum*, 555 U.S. at 481–82 (Stevens, J., concurring), 484–85 (Breyer, J., concurring), 485–87 (Souter, J., concurring in the judgment); *Keller*, 496 U.S. at 10 (Rehnquist, C.J., referring to the "so-called 'government speech' doctrine.").

In his *Summum* concurrence, Justice Stevens expressed that the Court's prior "decisions relying on the recently minted government speech doctrine to

uphold government action have been few and, in my view, of doubtful merit." *Summum*, 555 U.S. at 481 (Stevens, J., concurring). Justice Stevens further explained that, while he did not intend "to indicate agreement with our earlier decisions," he joined in the Court's opinion because, "[u]nlike other decisions relying on the government speech doctrine, our decision in this case excuses no retaliation for, or coercion of, private speech." *Id.*

And Justice Stevens was not alone in his skepticism. Not only did Justice Ginsberg join in his concurrence, but Justices Breyer and Souter issued separate concurrences that echoed similar concerns. *See Summum*, 555 U.S. at 484–85 (Breyer, J., concurring), 485–87 (Souter, J., concurring in the judgment). Justice Breyer's concurrence clarified that he joined the Court's opinion "on the understanding that **the 'government speech doctrine is a rule of thumb, not a rigid category**." *Id.* at 484 (Breyer, J., concurring) (emphasis added). He further advised that when resolving First Amendment cases, the Court "must sometimes look beyond an initial categorization. And, in doing so, it helps to ask whether a government action burdens speech disproportionately in light of the action's tendency to further a legitimate government objective." *Id.* As a further note of caution, Justice Souter emphasized that "[b]ecause the government speech doctrine, as Justice S[tevens] notes . . . , is 'recently minted,' it would do well for us to go slow in setting its bounds, which will affect existing doctrine in ways not yet explored." *Id.* at 485–87 (Souter, J., concurring in the judgment).

In recent years, this Court has continued to refine the role of the government speech doctrine in First Amendment law. Eight years after *Summum* was decided, in *Matal v. Tam*, Justice Kennedy felt it necessary to write separately in order to "explain[] in greater detail why the First Amendment's protections against viewpoint discrimination" applied to the trademark at issue, and to "submit[] further that the viewpoint discrimination rationale renders unnecessary any extended treatment of other questions of law raised by the parties." *Matal*, 582 U.S. at 247 (Kennedy, J., concurring in part and concurring in the judgment). In Justice Kennedy's view,

> The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. That danger is all the greater if the ideas or perspectives are ones a particular audience might think offensive, at least at first hearing. An initial reaction may prompt further reflection, leading to a more reasoned, more tolerant position.
>
> . . .
>
> It is telling that the Court's precedents have recognized just one narrow situation in which viewpoint discrimination is permissible: where the government itself is speaking or recruiting others to communicate a message on its behalf. The exception is

> necessary to allow the government to stake out positions and pursue policies. But it is also narrow, to prevent the government from claiming that every government program is exempt from the First Amendment.
>
> . . .
>
> A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.

Id. at 250, 253–54 (internal citations omitted).

More recently, in *Shurtleff*, Justice Alito also expressed concern that the current body of government speech precedent, taken to its logical extreme, might permit viewpoint discrimination:

> [T]he doctrine is based on the notion that governmental communication . . . do[es] not normally "restrict the activities of … persons acting as private individuals." [quoting *Rust*, 500 U.S. at 198–99; other citations omitted.] So government speech in the literal sense is not exempt from First Amendment attack if it uses a

> means that restricts private expression in a way that "abridges" the freedom of speech, as is the case with compelled speech. Were it otherwise, virtually every government action that regulates private speech would, paradoxically, qualify as government speech unregulated by the First Amendment. **Naked censorship of a speaker based on viewpoint, for example, might well constitute "expression" in the thin sense that it conveys the government's disapproval of the speaker's message. But plainly that kind of action cannot fall beyond the reach of the First Amendment**.

596 U.S. at 269 (Alito, J., concurring in the judgment) (emphasis added). With this in mind, Justice Alito proposed the following rule:

> [T]o establish that expression constitutes government speech exempt from First Amendment attack, the government must satisfy two conditions. **First**, it must show that the challenged activity constitutes government speech in the literal sense—purposeful communication of a governmentally determined message by a person acting within the scope of a power to speak for the government. **Second**, the government must establish it did not rely on a means that abridges the speech of persons acting in a private

> capacity. It is only then that "the Free Speech Clause has no application."

Id. at 269–70 (emphasis added).

D. The Government Speech Doctrine Cannot Be Employed to Discriminate Against Disfavored Protected Associations.

In *Summon*, the Court predicted the democratic process would ensure government speech did not swallow the First Amendment. 555 U.S. at 468–69 (highlighting that the government is accountable to the voters for its speech). But in joining the opinion, both Justice Stevens (with whom Justice Ginsburg joined) and Justice Breyer expressed their concern that the government speech doctrine might excuse "retaliation for, or coercion of, private speech." *Id.* at 481 (Stevens, J., concurring); *see also id.* 484 (Breyer, J., concurring) (in the context of analyzing "government speech," suggesting that "it helps to ask whether a government action burdens speech disproportionately in light of the action's tendency to further a legitimate government objective").

If the democratic process is all that stands in the way of the government's steamrolling First Amendment speech through its own speech, then there is no assurance that speech from "minority, dissident groups" will enjoy First Amendment protection. *See Button*, 371 U.S. at 429; see also Helen Norton, *The Equal Protection Implications of Government's Hateful Speech*, 54 Wm. & Mary L. Rev. 159, 170 (2012) (explaining that government speech

"often targets unpopular minorities in situations when ordinary political accountability measures provide no meaningful remedy").

Consider, for instance, some of the potential ramifications of the Second Circuit's opinion in this case. *See Vullo*, 49 F.4th at 714–19. Imagine that Massachusetts wished to target the speech of pro-life healthcare organizations for political reasons. Rather than pass a regulation restricting their speech, which would be unconstitutional on its face, the Massachusetts Department of Public Health could simply meet with healthcare providers and insurers, convey its concern for the potential "reputational harm" risked by their continued association with pro-life groups, and imply that such support *could* lead to unfavorable regulatory scrutiny and a loss of state contracts. Would the insurance companies and healthcare providers—who presumably would rather protect their bottom-line and avoid adverse regulatory consequences than take a political stand on abortion—reasonably be expected to decline such a request by the state? After all, it is not their speech being restricted.

Or suppose that California state officials privately met with executives of major corporations and conveyed their displeasure over the corporations' donations to groups advocating for immigration reform, hinting that their continued support for such organizations *could* harm the corporations' standing with state agencies and negatively affect their public image. Would one reasonably expect a corporation such as the Walt Disney Company to risk adverse

regulatory consequences to protect the speech of an organization advocating for immigration reform?

Each of these scenarios, like the case *sub judice*, presents viewpoint discrimination by other means. And the Second Circuit's test of whether the government speech "attempts to convince [or] attempts to coerce," *Vullo*, 49 F.4th at 715, has proven unable to protect the First Amendment rights of minority groups.

The hypothetical situations above reveal a perplexing paradox that emerges from this Court's precedent developing the government speech doctrine: "To satisfy traditional First Amendment tests, the government must show that it is *not* discriminating against a viewpoint. And yet if the government shows that it *is* condemning or supporting a viewpoint, it may be able to invoke the government speech defense and thereby avoid constitutional scrutiny all together."[5] Consequently, in such situations, a rigid application of the government speech doctrine threatens to "reward[] what the rest of the First Amendment forbids: viewpoint discrimination against private speech."[6]

This Court need not look further than its own decisions to craft a rule that preserves viewpoint neutrality while maintaining government speech in certain contexts. As previously stated, a blending of Justice Kennedy's concurrence in *Matal*, 582 U.S. at

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[5] Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. Rev. 695, 695 (2011) (emphasis original).
[6] *Id.*

248 (Kennedy, J., concurring in part and concurring in the judgment), and Justice Alito's concurrence in *Shurtleff*, 596 U.S. at 269–70 (Alito, J., concurring in the judgment), provides a rule that both preserves this Court's commitment to viewpoint neutrality and allows the government an ample degree of latitude to speak as is necessary to accomplish their policy goals.

Specifically, this rule would explicitly recognize that when the government is speaking directly,[7] the government speech doctrine is available as a defense to a claim of viewpoint discrimination. To establish such a defense, the government must show:

> (1) "that the challenged activity constitutes government discrimination in the literal sense—purposeful communication of a governmentally determined message by a person acting within the scope of power to speak for the government;" and
>
> (2) that its speech did not target the speech of persons acting in a private capacity "for disfavor based on the views expressed."

See Shurtleff, 596 U.S. at 269–70; *Matel*, 582 U.S. at 248 (Kennedy, J., concurring in part and concurring in the judgment).

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[7] As opposed to the *Summum* and *Bryant* line of cases, where the government is speaking indirectly by providing a channel for private speech.

Were such a rule applied to the facts of this case, the analysis would be straightforward. Respondent's speech almost certainly would satisfy prong one of the government speech defense, as her speech reflects a "purposeful communication of a governmentally determined message by a person acting within the scope of power to speak for the government." *See Shurtleff*, 596 U.S. at 269–70. But based on Respondent's extensive and unapologetic targeting of the NRA because she disagrees with its message, her speech would almost certainly fail prong two. *See Shurtleff*, 596 U.S. at 269–70; *Matel*, 582 U.S. at 248. Thus, the government speech defense would be unavailable, and the NRA's First Amendment claim would be evaluated under this Court's traditional viewpoint discrimination analysis. *See generally Rosenberger v. Rector and Visitors of U. of Virginia*, 515 U.S. 819, 828–30 (1995).[8]

[8] This analysis would also provide a stage to consider the unstated but apparent motive underlying the government's action before ruling that it is unconstrained by the First Amendment. *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 416 (1996).

CONCLUSION

For the foregoing reasons, the Court should revise its test for government speech that abridges speech protected by the First Amendment, and should reverse the Second Circuit's decision below.

Respectfully submitted,

DAVID A. WARRINGTON
Counsel of Record
GARY M. LAWKOWSKI
DHILLON LAW GROUP INC.
2121 Eisenhower Ave.
Suite 608
Alexandria, VA 22314
(703) 574-1206
dwarrington@dhillonlaw.com
glawkowski@dhillonlaw.com

JOSIAH CONTARINO
ANTHONY J. FUSARO, JR.
DHILLON LAW GROUP INC.
50 Park Pl.
Suite 1105
Newark, NJ 07102
(917) 423-7221
jcontarino@dhillonlaw.com
afusaro@dhillonlaw.com

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