No. ________

In The
Supreme Court of the United States

THE NATIONAL RIFLE ASSOCIATION OF AMERICA.,

Petitioner,

v.

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

Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI PUBLIC COPY-SEALED MATERIALS REDACTED

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QUESTIONS PRESENTED

Bantam Books v. *Sullivan* held that a state commission with no formal regulatory power violated the First Amendment when it "deliberately set out to achieve the suppression of publications" through "informal sanctions," including the "threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation." 372 U.S. 58, 66-67 (1963). Respondent here, wielding enormous regulatory power as the head of New York's Department of Financial Services ("DFS"), applied similar pressure tactics—including backchannel threats, ominous guidance letters, and selective enforcement of regulatory infractions—to induce banks and insurance companies to avoid doing business with Petitioner, a gun rights advocacy group. App. 199-200 ¶ 21. Respondent targeted Petitioner explicitly based on its Second Amendment advocacy, which DFS's official regulatory guidance deemed a "reputational risk" to any financial institution serving the NRA. *Id.* at 199, n.16. The Second Circuit held such conduct permissible as a matter of law, reasoning that "this age of enhanced corporate social responsibility" justifies regulatory concern about "general backlash" against a customer's political speech. *Id.* at 29-30. Accordingly, the questions presented are:

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

QUESTIONS PRESENTED—Continued

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

PARTIES TO THE PROCEEDING

Petitioner is the National Rifle Association of America ("NRA"), which was the plaintiff-appellee in the Second Circuit.

Respondent is Maria T. Vullo, both individually and in her former official capacity as the Superintendent of the New York Department of Financial Services ("DFS"). Vullo was the defendant-appellant in the Second Circuit.

CORPORATE DISCLOSURE STATEMENT

The NRA has no parent corporation and no publicly held company owns 10 percent or more of its stock.

LIST OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *National Rifle Assoc.* v. *Cuomo*, No. 18-cv-0566-TJM-CFH (N.D.N.Y.) (decision and order denying in part and granting in part defendants' motion to dismiss issued November 6, 2018; decision and order denying Vullo's motion to dismiss issued March 15, 2021); and
- *Vullo* v. *National Rifle Assoc.*, No. 21-636 (2d Cir.) (opinion reversing District Court and ordering entry of judgment for Vullo issued September 22, 2022; order denying rehearing en banc issued on November 9, 2022).

LIST OF RELATED PROCEEDINGS—Continued

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the National Rifle Association of America ("NRA"), respectfully seeks a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Second Circuit is reported at 49 F.4th 700. The district court's two decisions are reported at 350 F. Supp. 3d 94 and 525 F. Supp. 3d 382.

JURISDICTION

The Second Circuit entered judgment on September 22, 2022. It denied rehearing on November 9, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

42 U.S.C. § 1983 provides, as relevant here: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any . . . person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured. . . ."

INTRODUCTION

The Second Circuit's opinion below gives state officials free rein to financially blacklist their political opponents—from gun-rights groups, to abortion-rights groups, to environmentalist groups, and beyond. It lets state officials "threaten[] regulated institutions with costly investigations, increased regulatory scrutiny and penalties should they fail to discontinue their arrangements with" a controversial speaker, on the ground that disfavored political speech poses a regulable "reputational risk." App. 199 ¶ 21 (cleaned up). It also permits selective investigations and penalties targeting business arrangements with disfavored speakers, even where the regulator premises its hostility explicitly on an entity's political speech and treats leniently, or exempts, identical transactions with customers who lack controversial views. In sum, it lets government officials, acting with undisguised political animus, transmute "general backlash" against controversial advocacy into a justification for crackdowns on advocates (and firms who serve them), eviscerating free speech rights.

Reaching this result, the Second Circuit disregards basic pleading standards and undermines fundamental First Amendment freedoms. It also departs from this Court's precedent in *Bantam Books, Inc.* v. *Sullivan* and from the Seventh Circuit's precedent in *Backpage.com, LLC* v. *Dart*. See 372 U.S. 58, 66-67 (1963); 807 F.3d 229, 231-32 (7th Cir. 2015).

This case arises from a series of actions—including press releases, official regulatory guidance, and contemporaneous investigations and penalties—issued by or on behalf of New York's powerful Department of Financial Services ("DFS") against financial institutions doing business with the NRA. Among other things, the Complaint states that Superintendent Maria Vullo: (1) warned regulated institutions that doing business with Second Amendment advocacy groups posed "reputational risk" of concern to DFS; (2) secretly offered leniency to insurers for unrelated infractions if they dropped the NRA; and (3) extracted highly-publicized and over-reaching consent orders, and multi-million dollar penalties, from firms that formerly served the NRA. S. App. 5-34. Citing private telephone calls, internal insurer documents, and statements by an anonymous banking executive to industry press, the Complaint alleges that numerous financial institutions perceived Vullo's actions as threatening and, therefore, ceased business arrangements with the NRA or refused new ones. *Id.* at 33-34.

The NRA brought First Amendment claims against Vullo and Governor Andrew Cuomo in their official and individual capacities. The individual-capacity claims

against Vullo, which were the subject of the Second Circuit's decision, withstood two motions to dismiss. App. 15-16. But when Vullo appealed the District Court's refusal to grant her qualified immunity at the pleading stage, the Second Circuit held that the NRA's allegations fail to state a First Amendment claim at all. *Id*. at 27.

In effect, the Second Circuit holds that a government official must explicitly threaten adverse consequences for disfavored speech—and must do so in the absence of any contemporaneous assertion of a regulatory interest—for a First Amendment retaliation claim to arise. *Id*. at 28-29. The Second Circuit's opinion thereby creates a circuit split with the Seventh Circuit's decision in *Backpage.com*, which held that a government official violated the First Amendment in circumstances closely comparable to these. See 807 F.3d at 230-39.

In addition, the Second Circuit refuses to accept the Complaint's allegation that Vullo clearly and unambiguously threatened insurers in private meetings, App. 199 ¶ 21, and selectively parses Vullo's official communications to disregard key passages and deny NRA the favorable inferences to which it is entitled on a motion to dismiss. The Second Circuit's decision thus defies this Court's command that, in evaluating qualified immunity, "courts must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions." *Tolan* v. *Cotton*, 572 U.S. 650, 655-56 (2014) (per curiam) (citing *Brosseau* v. *Haugen*, 543 U.S. 194, 195 (2004)). The Second Circuit

denudes Vullo's regulatory guidance of the "context" that made it ominous, while importing favorable "context" to frame Vullo's contemporaneous, selective targeting of NRA business associates as benign. "The 'context' here," the Circuit opines, "was an investigation, commenced months before the meetings, that was triggered by a referral from the DA's Office." App. 31. The Circuit ignores boasts by Vullo's boss, Governor Cuomo, that her regulatory actions were "forcing the NRA into financial jeopardy."[1] And the Second Circuit's suggestion that Vullo had non-retaliatory motives for investigating the insurance policies at issue is rebutted by the facts pleaded in the Complaint. S. App. 10 ¶ 21, 28-29 ¶¶ 69-70, 31-32 ¶¶ 76-79.

The Second Circuit goes on to suggest that even if Vullo did make threats, such threats were justified by the "general backlash" against the NRA "and businesses associated with them" which "was intense after the Parkland shooting." App. 29-30. Indeed, this backlash "continues today," with many people "speaking out" against the NRA's gun rights advocacy. *Ibid.* Such "backlash" against a speaker's viewpoint, the Second Circuit opines, "likely" has financial consequences that would justify financial blacklisting of that speaker for its controversial advocacy. *Ibid.*

In support, the Second Circuit cites a "diversity, equity, and inclusion" consultant who charges companies

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

for "consulting packages" to implement "corporate social responsibility" programs,[2] as well as a "survey" commissioned by a marketing company that "strives to insert the brand's social mission and innovations into mainstream conversations through traditional and social media."[3] The reliance on such sources underscores the unsoundness of the opinion below.[4]

This Court has not hesitated to summarily overturn circuit court decisions, like the Second Circuit's,

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[2] See App. 30, n.14 (citing Lily Zheng, *We're Entering the Age of Corporate Social Justice*, Harv. Bus. Rev. (June 15, 2020), https://hbr.org/2020/06/were-entering-the-age-of-corporate-social-justice); Lily Zheng, *Services*, https://lilyzheng.co/home/services/ (offering price quotes for "DEI Assessment and Strategy projects, Expert Consulting, and Speaking" services).

[3] See *id.* at 33, n.14 (citing Cone Communications, *Americans Willing to Buy or Boycott Companies Based on Corporate Values, According to New Research by Cone Communications*, (May 17, 2017), https://conecomm.com/2017-5-15-americans-willing-to-buy-or-boycott-companiesbased-on-corporate-values-according-to-new-research-by-cone-communications/); Cone Communications, *Our Approach*, https://conecomm.com/purpose-expertise(stating that Cone "help[s] our clients discover their Purpose. Their North Star. Their Reason for Being"); Cone Communications, *Ben & Jerry's*, https://conecomm.com/case-studies-benandjerrys/ (touting the company's work with Ben & Jerry's ice cream in "helping promote the company's brand and experiences as influences for good in the world").

[4] The Second Circuit's internet research was not limited to these two sources. In addition to the two articles noted above, the Second Circuit cites articles from Reuters, the Washington Post, and National Public Radio, each of which is critical of the NRA and Second Amendment advocacy in general. *Id.* at 7-8, 30. For example, one article cited by the Second Circuit profiles an anti-NRA operative who works for a major gun control group. *Id*. at 30.

that disregard the applicable pleading standard in determining qualified immunity. Here, the Second Circuit makes the same error as the lower courts in *Lombardo* v. *City of St. Louis, Missouri*, 141 S. Ct. 2239 (2021) (per curiam), *Sause* v. *Bauer*, 138 S. Ct. 2561 (2018) (per curiam), and *Tolan* v. *Cotton*, 572 U.S. 650 (2014) (per curiam). In all three, this Court summarily reversed because the circuit courts refused to accept well-pleaded facts and draw reasonable inferences in favor of the non-moving party in determining qualified immunity.

The public importance of this case cannot be overstated. A regulatory regime—even a facially content-neutral one—that "inhibit[s] protected freedoms of expression and association" violates the First Amendment. See *NAACP* v. *Button*, 371 U.S. 415, 437-38 (1963); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460-62 (1958). An overt campaign by state officials to wield regulatory power against a disfavored civil rights organization—here the NRA—precisely because of its disfavored speech at least as clearly merits this Court's attention and reversal.

Reversal is urgent because the Second Circuit's opinion threatens basic First Amendment rights at a time when the First Amendment is under widespread attack. See *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2302-03 (2019) (Alito, J., concurring). As the American Civil Liberties Union ("ACLU") has warned, "If the NRA's allegations were deemed insufficient to survive the

motion to dismiss, it would set a dangerous precedent for advocacy groups across the political spectrum."[5]

STATEMENT OF THE CASE

Vullo is the former head of DFS, an agency with sweeping regulatory and enforcement powers that it wields against banks and insurance companies. App. 201-02 ¶ 25. Among other things, DFS can initiate civil and criminal investigations and civil enforcement actions. *Ibid.* And, it may refer matters to the attorney general for criminal enforcement. Due to its vast power, DFS directives regarding "risk management" must be heeded by financial institutions. *Ibid.*

Former New York Governor Andrew Cuomo harbors open animus against the NRA due to its gun rights advocacy. *Id*. at 195-99 ¶¶ 14-20. For twenty years, he has been trying to shut down the NRA. *Ibid.* He famously declared that firearms advocates "have no place in the state of New York." *Id*. at 197 ¶ 17. Vullo, Cuomo's longtime lieutenant and appointee, shares Cuomo's animus. *Id*. at 198-99 ¶ 20.

The NRA has frequently been targeted for boycotts by anti-gun activists. *Id*. at 205-06 ¶ 33. But those campaigns historically failed to deprive the NRA of important business relationships because they lacked the

[5] Brief of Amicus Curiae American Civil Liberties Union in Support of the Plaintiff's Opposition to the Defendant's Motion to Dismiss, *National Rifle Assoc.* v. *Cuomo*, No. 18-cv-0566-TJM-CFH, ECF No. 49-1 (N.D.N.Y. Aug. 24, 2018) ("ACLU Br."), at 4.

government's coercive backing. *Ibid.* This changed in Fall 2017, when a pro-gun control organization (Everytown for Gun Safety) successfully enlisted Vullo to silence the NRA. *Id*. at 205-06 ¶¶ 33-34. Everytown contacted the New York County District Attorney's Office as part of its political mission to undermine the NRA. *Id*. at 206 ¶ 34. It used supposed problems with Carry Guard, a concealed-carry insurance program promoted by NRA, as a pretext. *Ibid.* The DA's Office referred the matter to Vullo. *Ibid.*

In response, Vullo launched an investigation that ostensibly focused on Carry Guard but quickly expanded to target all the so-called "affinity" insurance products marketed to NRA members—including policies marketed identically to non-NRA affinity groups. *Id.* at 208 ¶ 37, 216-17 ¶¶ 58-60. Vullo's investigation targeted no self-defense insurance products except ones endorsed by the NRA. *Id*. at 205-06 ¶¶ 35-36. Instead, Vullo selectively targeted the NRA because of the NRA's Second Amendment advocacy. *Ibid.*

Vullo threatened regulated institutions with costly investigations, increased regulatory scrutiny, and penalties should they fail to discontinue their arrangements with the NRA. *Id*. at 199-200 ¶ 21. These exhortations were not limited to Carry Guard, as she indicated that any business relationship with the NRA would invite adverse action. *Id*. at 208 ¶ 38.

Beginning in February 2018, Vullo held several meetings with the executives of institutions subject to her regulatory power. At those meetings, she made

back-channel threats that they cease providing services to the NRA in connection with affinity-insurance programs that the NRA endorsed. *Id*. at 199-200 ¶ 21, 210 ¶ 45, 221 ¶ 67. Although Vullo discussed many technical regulatory infractions plaguing the affinity-insurance marketplace, she made clear that her real interest lay in causing the companies to stop providing insurance to the NRA. *Ibid.* Vullo declared that DFS would focus its forthcoming affinity-insurance enforcement action solely on those syndicates which served the NRA and ignore other syndicates writing similar policies. *Id*. at 223 ¶ 69.

On April 19, 2018, Vullo had DFS issue official regulatory guidance (the "Guidance Documents") directed at all banks and insurance companies doing business in New York. *Id*. at 211 ¶ 46. In the Guidance Documents, DFS favorably cited groups that had "severed their ties with the NRA" as examples of "corporate social responsibility," and warned regulated institutions of the "reputational risk" of further "dealings with the NRA" in light of the "social backlash" against the group for its Second Amendment advocacy. *Id.* at 246-51. DFS "encourage[d]" regulated institutions to take "prompt actions to manage" this reputational risk. *Ibid.* A press release issued by Vullo the same day "urge[d] all insurance companies and banks doing business in New York to . . . discontinue[ ] their arrangements with the NRA." *Id.* at 244. In the same press release, then-Governor Cuomo took credit for directing Vullo to take action against the NRA and pointed out to those doing business with the NRA that the "risk" was not just "a

matter of reputation." *Ibid.* The Press Release favorably cited two "DFS-regulated insurer[s]" that had recently "ended relationships with the NRA." *Ibid.*

DFS directives regarding "risk management" must be taken seriously by financial institutions, as risk-management deficiencies can result in regulatory action, including fines of hundreds of millions of dollars. *Id.* at 202 ¶ 26. Thus, Vullo's phrasing was deliberate, implicitly threatening enforcement risk. Testimonial statements from three different New York financial services experts and regulated parties reflect the Press Release and Guidance Documents were widely perceived within the industry as demands not to do business with NRA—or else. *Id*. at 213 ¶ 53, 227-28 ¶ 81.

Then, in the first week of May 2018, DFS announced multi-million-dollar fines against two insurance firms that dared to do business with NRA. *Id*. at 199-200 ¶ 21, 214 ¶ 54, 218 ¶ 62. Those insurers agreed to cease underwriting, managing, or selling affinity-insurance programs for the NRA in perpetuity, regardless of the legality of the program. Shortly thereafter, a third firm, Lloyd's, announced on May 9, 2018 that it had directed its underwriters to terminate all insurance programs associated with the NRA and not to provide any insurance to the NRA in the future due to DFS's investigations into the NRA and its business partners. *Ibid.*

Privately, these companies stated that the decision to sever ties with the NRA arose from fear of

regulatory hostility from DFS. The NRA's longtime insurance broker, Lockton, worried about "losing [its] license" to do business in New York, *id.* at 219 ¶ 42, and internal documents obtained from Lloyd's reveal that Vullo's investigation had transformed the "gun issue" into a compliance matter. S. App. 29 ¶ 70. Needing to remain in DFS's good graces, Lloyd's stopped underwriting lawful NRA-related insurance. *Ibid.* The NRA has encountered similar fears from providers of corporate insurance, and even banks contacted for basic depository services. App. 227-28 ¶¶ 80-82. Before Vullo's threats, the same banks engaged readily with the NRA. *Ibid.*

On May 11, 2018, NRA sued Cuomo and Vullo in their official and individual capacities. Following motions to dismiss, the District Court upheld the NRA's First Count, alleging an implicit censorship regime, and its Second Count, alleging retaliation against the NRA based on the content of its speech, and denied Cuomo and Vullo's motions to dismiss those counts based on qualified immunity. *Id.* at 94-184.[6] These rulings were reaffirmed by the District Court on March 15, 2021:

> [I]n the context of the factual allegations asserted in the Amended Complaint, it was plausible to conclude that the combination of Defendants' actions, including Ms. Vullo's statements in the Guidance Letters and Cuomo Press Release as well as the purported 'backroom

[6] The Second Circuit incorrectly states that all claims against Cuomo were dismissed. *Id*. at 15.

> exhortations,' could be interpreted as a veiled threat to regulated industries to disassociate with the NRA or risk DFS enforcement action.

Id. at 72. And the District Court held that its conclusion was reinforced "by new allegations in the [Second Amended Complaint] that can be reasonably interpreted as pre-Guidance Letters backroom threats by Ms. Vullo of DFS enforcement against entities that did not disassociate with the NRA." *Ibid.*

Vullo appealed; Cuomo did not. The Second Circuit's September 22, 2022 decision reversed the district court's denial of Vullo's motion to dismiss and remanded the case with directions to enter judgment for Vullo. The Second Circuit held that the NRA failed to plead a First Amendment claim. *Id.* at 27. Based almost entirely on that reasoning, it also found that Vullo was shielded by qualified immunity.

The NRA petitioned for rehearing en banc on October 6, 2022. That petition was denied on November 9, 2022.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit Incorrectly Fails to Recognize the Coercive Nature of Superintendent Vullo's Statements

A. Vullo's Statements, as Alleged by the NRA, Were Reasonably Perceived as Coercive

In determining whether a government official has violated the First Amendment by engaging in "coerc[ion]" and "intimidation," courts look to three factors: (1) the defendants' "regulatory or other decisionmaking authority" over the targeted entities; (2) the language of the allegedly threatening statements; and (3) the perception of a threat by the targeted entities and the targets' response. *Backpage.com, LLC* v. *Dart*, 807 F.3d 229, 230-32 (7th Cir. 2015) (cleaned up); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 67-69 (1963). Here, the NRA clearly pleaded all three elements.

1. The Department of Financial Services Has Vast Regulatory Power over Financial Services Companies

First, as Superintendent of DFS, Vullo wielded enormous power over the targeted entities. She could initiate investigations and civil enforcement actions against regulated financial services firms operating in New York and had the power to refer matters to the attorney general for criminal enforcement. App. 201-02 ¶ 25. The NRA pleaded that DFS was created in 2011 by merging the enforcement powers of several existing

departments with the goal of exercising oversight of New York financial markets. *Id*. at 201 ¶ 24. The new agency's creation generated headlines for its expansive prerogatives and capabilities; the first DFS superintendent was popularly known as "the new sheriff of Wall Street" and compared to an all-powerful monarch. *Id*. at 202 ¶ 25.

DFS directives regarding "risk management" command deference from financial institutions, because risk-management deficiencies can result in fines of hundreds of millions of dollars. *Id*. at ¶ 26. Given these realities, when Vullo, at her meetings with Lloyd's, "presented [her] views on gun control and [her] desire to leverage [her] powers to combat the availability of firearms," her "views" had to be taken quite seriously. *Id.* at 221 ¶ 67.

Vullo's enforcement powers vastly exceeded those of the defendants in *Bantam Books* and *Backpage.com*, both of which had no formal enforcement powers over their targets at all. In *Bantam Books*, this Court enjoined the activities of the Rhode Island Commission to Encourage Morality in Youth, which was "limited to informal sanctions" and had no formal regulatory powers whatsoever. 372 U.S. at 66-67. The Court nonetheless held that the Commission's distribution of notices to booksellers of books deemed "obscene" violated the First Amendment. *Ibid.* Acknowledging "that appellants' books have not been seized or banned by the State, and that no one has been prosecuted for their possession or sale," the Court nonetheless found a First Amendment violation because "the record amply

demonstrates that the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim." *Id*. at 67. The Court emphasized that courts must "look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief." *Id*. at 67-68.

And this was so even though the Commission in *Bantam Books* completely lacked any formal enforcement power and took no action against the bookseller in question. In contrast, Superintendent Vullo had enormous formal powers to fine financial institutions hundreds of millions of dollars for not complying with her regulatory directives, and in fact selectively imposed multi-million dollar fines against firms that did business with the NRA after having warned them that ties with the NRA would lead to enforcement actions. App. 201-02 ¶¶ 24-26, 206-08 ¶¶ 35-38; S. App. 22-32 ¶¶ 54-79.

Likewise, *Backpage.com* involved a letter written by the Sheriff of Cook County, Illinois to Visa and Mastercard, exhorting them to cease processing payments for advertisements on Backpage.com. 807 F.3d at 231. The Seventh Circuit found that the Sheriff's letter violated the First Amendment, despite the Sheriff's admission that "his department had no authority to take any official action with respect to Visa and MasterCard" and the fact that Visa provided an affidavit stating that "at no point did Visa perceive Sheriff Dart to be threatening Visa." *Id*. at 233, 236. Again, Sheriff Dart's lack of any formal power over his targets

contrasts sharply with Vullo's enormous power over her targets in this case.

2. The NRA Adequately Pleaded That Superintendent Vullo's Words Were "Thinly Veiled Threats" of Retaliation

Second, the NRA pleaded threats by Vullo that were readily understood and swiftly heeded by the firms she supervised. The Complaint recounted that Vullo held several backchannel meetings with insurers where she exhorted them to end their business relationships with gun groups, invoking official carrots and sticks—such as leniency or prosecution for infractions unrelated to any NRA business. App. 199-200 ¶ 21. The Complaint also alleged that "Vullo and DFS have threatened regulated institutions with costly investigations, increased regulatory scrutiny and penalties should they fail to discontinue their arrangements with the NRA." *Ibid.* The Second Circuit thus errs in concluding that "the allegations do not plausibly amount to an unconstitutional threat or coercion to chill the NRA's free speech."[7]

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[7] The Second Circuit criticizes the Complaint's "lack of precision as to what Vullo actually said to make her message clear." App. 31. But the NRA cannot, and is not required to, plead specific facts regarding statements made by Vullo at a meeting where it was not in attendance.

The Second Circuit also apparently disregards the Complaint's detailed allegations that Vullo made backchannel threats at private meetings with regulated entities, see *id.* at 199-200

The Second Circuit also errs in its incomplete and conclusory analysis of the precise language and tone of Vullo's April 2018 Guidance Documents and Press Release, which it calls "even-handed" despite extraordinary indicia otherwise. App. 31. The Second Circuit concludes of those statements, "Although [Vullo] did have regulatory authority over the target audience, and even assuming some may have perceived the remarks as threatening, the Guidance Letters and Press Release were written in an even-handed, non-threatening tone and employed words intended to persuade rather than intimidate."[8] *Id*. at 28-29. But it is

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¶ 21, 209 ¶¶ 41-42, on the ground that the word "threat" was a "legal conclusion" it need not accept as true. *Id.* at 27. But the Complaint cites direct testimonial statements, such as the admission of Lockton's CEO that he was forced to "drop" the NRA due to regulatory pressure, and the fact that that the NRA's corporate insurance carrier abruptly refused to renew coverage due to Vullo's threats. *Id*. at 209-10 ¶¶ 42-44. Thus, separating the words "threat" and "coerce" from "the Complaint's factual allegations" leaves in place factual allegations supporting the use of the words "threat" and "coerce" to describe Vullo's words at her meetings with regulated entities. *Id.* at 20. Consistent with *Ashcroft* v. *Iqbal*, to the extent that such terms contain "legal conclusions," they are amply "supported by factual allegations" rather than being "an unadorned, defendant-unlawfully-harmed-me accusation." 556 U.S. 662, 677-79 (2009).

[8] By construing Vullo's exhortations to be non-threatening as a matter of law – regardless of whether the financial institutions she supervised perceived them as threatening—the Second Circuit also enshrines its own blinkered construction of the Guidance Documents and precludes discovery (and, ultimately, jury deliberations) on whether the banks and insurers cowed by Vullo acted reasonably and were thus subjected to a requisite chilling effect.

implausible to say that the Press Release and Guidance Documents had an "even-handed" tone.

Those documents note a "social backlash against the [NRA] and similar organizations that promote guns" that "*can no longer be ignored*" by regulated entities. *Id.* at 246, 249-50 (emphasis added). They state that "[DFS] encourages regulated institutions to review any relationships they have with the NRA or similar gun promotion organizations, and to take prompt actions to managing these risks and promote public health and safety." *Id*. at 248, 251. Given the framing of DFS's letters, there could be no doubt what "prompt actions" to "promote public health and safety" DFS was urging: severing ties with the NRA.

To be sure, these statements do not *explicitly* threaten regulatory action against entities that do not cut ties with the NRA, but instead merely strongly suggest it. Because of that, the Second Circuit holds that, "as a matter of law . . . these statements do not cross the line between an attempt to convince and an attempt to coerce." *Id*. at 28-29. Yet neither this Court in *Bantam Books* nor the Seventh Circuit in *Backpage.com* required such explicit threats.

Instead, both *Bantam Books* and *Backpage.com* considered how a reasonable target of the statements would have perceived them. And a reasonable financial industry executive would not have perceived Vullo's official guidance letters, statements or backroom enforcement threats as simple expressions of Vullo's personal political preference.

Instead, the statements clearly invoked her regulatory authority as Superintendent of DFS. *Id*. at 27-28. In her Press Release, Vullo stated "DFS urges all insurance companies and banks doing business in New York to join the companies that have already discontinued their arrangements with the NRA." *Id*. at 244. This is a statement that DFS, a regulatory body, calls for this result—not simply abstract advocacy of Vullo's own preferences. In addition, DFS's "Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations" was issued on DFS letterhead and clearly constituted DFS's instructions on matters within its jurisdiction, not a statement of Vullo's political opinions. *Id*. at 246-52.

Indeed, the Second Circuit acknowledges that Vullo "sought to convince *DFS-regulated entities* to sever business relationships with gun promotion groups." *Id.* at 28 (emphasis added). And the guidance documents were indeed addressed to the entities that DFS regulates—"The Chief Executive Officers or Equivalents of All Insurers Doing Business in the State of New York" and "The Chief Executive Officers or Equivalents of New York State Chartered or Licensed Financial Institutions"—not to the public at large, as would be expected for a statement of Vullo's own preferences. *Id*. at 246, 249. If Vullo merely sought to convince instead of coerce, why would she limit her message to the entities over which she had direct regulatory authority?

The Second Circuit's analysis also ignores the Complaint's well-pleaded allegation that, by invoking the "risk management" obligations of DFS-regulated

entities in her April 2018 DFS Guidance Documents, Vullo was indeed implicitly threatening adverse regulatory consequences for entities that refused to blacklist the NRA. *Id.* at 202 ¶ 26. And that is an eminently plausible allegation, because DFS directives regarding "risk management" must be taken seriously by financial institutions: risk-management deficiencies can result in fines of hundreds of millions of dollars. *Ibid.*

Thus, the Second Circuit's analysis hinges almost entirely on a factor that should not be dispositive—the precise word choice and tone used by the government official. *Id.* at 28. The Second Circuit stated, "Although [Vullo] did have regulatory authority over the target audience, and even assuming some may have perceived the remarks as threatening, the Guidance Letters and Press Release were written in an even-handed, nonthreatening tone and employed words intended to persuade rather than intimidate." *Id.* at 28-29. But this Court has cautioned that the First Amendment requires the Court to "look through forms to the substance," *Bantam Books*, 372 U.S. at 67, and to consider "thinly veiled threats" and not just express threats. *Id.* at 68.

Indeed, the Second Circuit's analysis here is irreconcilable with the Seventh Circuit's in *Backpage.com*. In that case, the local sheriff styled his outreach to credit card companies as a "request" from a "father and caring citizen." 807 F.3d at 230. The sheriff made no direct threats and had no official enforcement authority against his target audience. *Id*. at 236. Indeed, Visa

"filed an affidavit stating that 'at no point did Visa perceive Sheriff Dart to be threatening Visa.'" *Ibid.*

Nonetheless, the Seventh Circuit found that "the letter was not merely an expression of Sheriff Dart's opinion. It was designed to compel the credit card companies to act by inserting Dart into the discussion." *Ibid.* Although the procedural posture in *Backpage.com* did not require the same favorable inferences the NRA was owed here,[9] the Seventh Circuit rejected the lower court's assumption that the companies might have dropped Backpage for independent business reasons, noting a circumstance that was also pleaded by the NRA: that longstanding private-sector pressure failed to cow the same firms, but a government warning produced a swift reaction. *Id*. at 233; App. 205-06 ¶ 33.

DFS Superintendent Vullo's speech was made even more coercive in context by DFS's actions. The Complaint also pleads in detail that (1) Vullo selectively targeted the NRA and its financial services partners for discriminatory enforcement over minor, technical regulatory infractions that she had no interest in pursuing against anyone but "gun promotion groups" and (2) that Vullo opened her investigation in 2017 at the behest of an activist group with the goal of punishing the NRA for its gun rights advocacy. *Id*. at 199-200 ¶ 21, 205-08 ¶¶ 33-37; S. App. 28-29 ¶¶ 69-70.

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[9] Backpage sought a preliminary injunction, which requires a "far more searching inquiry" than a Rule 12(b)(6) analysis. See, *e.g.*, *Doe* v. *Univ. of S. Indiana*, 43 F.4th 784, 791 (7th Cir. 2022).

Indeed, substantively identical insurance programs with the same practices and features referenced by DFS in its investigation of the NRA's affinity programs were marketed and endorsed by New York affinity organizations such as the New York State Bar Association, the New York City Bar, the National Association for the Self-Employed, the New York Association of Professional Land Surveyors, and the New York State Psychological Association. App. 207-08 ¶¶ 36-37. None of those groups—and none of the entities that did business with those groups—suffered adverse regulatory consequences. *Id*. at 208 ¶ 37.

During the course of her investigations into Chubb and Lockton in late 2017 and early 2018, Vullo communicated to banks and insurers that they would face regulatory action if they failed to terminate their relationships with the NRA, indicating that any business relationship whatsoever with the NRA would invite adverse action. *Id.* at ¶ 38. And the Chubb and Lockton consent decrees, which imposed several million dollars in monetary penalties and permanently prohibited those entities from participating in any NRA-endorsed insurance program in New York, were announced just two weeks after the Guidance Documents were issued. *Id*. at 214 ¶ 54.

Under the same longstanding First Amendment principles applied in *Bantam Books* and *Backpage.com*, this Court has held that, when an employer's speech to employees is alleged to be threatening, courts "must take into account the economic dependence of the employees on their employers, and the necessary

tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 619 (1969). This equally applies when financial regulators speak to financial institutions, which are likewise dependent on the regulators' goodwill, and necessarily tend to pick up on regulators' veiled threats (especially where, as here, they are barely veiled at all).

This Court should reaffirm that First Amendment retaliation claims are evaluated based on substance, not on whether government officials use particular magic words. This Court held in *Bantam Books* that it would have been "naive to credit the State's assertion that these blacklists are in the nature of mere legal advice." 372 U.S. at 68-69. It was equally naive for the Second Circuit to credit Vullo's assertion that her backroom threats, guidance documents, and Press Release—which invoked her formal regulatory authority as head of DFS and expressly targeted the NRA—were merely non-coercive expressions of her own personal preference for "gun control over gun promotion" and not "instruments of regulation." App. 27-28.

3. The NRA Adequately Pleaded That the Targets of Superintendent Vullo's Statements Viewed Them as Threatening

Third, the NRA has also pleaded that the targeted entities clearly perceived Vullo's actions as

threatening—and acted on them accordingly. The Complaint cites testimonial statements from three different industry experts or regulated parties indicating that they perceived Vullo's Guidance Documents and Press Release as threats not to do business with the NRA. *Id*. at 213-14 ¶ 53, 227-28 ¶ 81. In addition, the Chairman of one of the NRA's insurance partners (Lockton) indicated that he was ending the company's association with the NRA solely because of threats from Vullo. *Id.* at 209 ¶ 42.

Not just the well-pleaded allegations of the Complaint, but also the Lloyd's Board Meeting minutes the NRA attaches to its Complaint, indicate that Lloyd's dropped its affiliation with NRA because of threats from Vullo. S. App. 29 ¶ 70. The Second Circuit thus refuses to credit direct testimonial statements indicating that Vullo made "clear and unambiguous" threats, and that her guidance documents were widely perceived by regulated parties as threats. App. 209 ¶ 42, 213-14 ¶ 53, 227-28 ¶ 81; S. App. 29 ¶ 70.

The Second Circuit cites the insurers' own consent orders in which they agreed to end their relationships with NRA as proof that Vullo's entire investigation was "plainly reasonable," "natural," and a "legitimate enforcement action." App. 33.[10] But the fact that the

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[10] Repeatedly, the Second Circuit characterizes the Carry Guard program as "provid[ing] coverage for losses caused by licensed firearms use, including criminal defense costs resulting from using a firearm with excessive force to protect persons or property, even if the insured was found to have acted with criminal intent." App. at 6. "In other words," the Second Circuit states,

insurers bowed to Vullo's threats and entered consent decrees ending their relationships with the NRA does not contradict the Complaint's extensive and well-pleaded allegations that Vullo selectively targeted insurers having relationships with the NRA for enforcement actions.

Indeed, under settled law, the fact that the insurers quickly buckled is persuasive evidence confirming the NRA's allegations of threats. In *Bantam Books*, for instance, this Court noted that one bookseller's "reaction on receipt of a notice was to take steps to stop further circulation of copies of the listed publications. . . . His 'cooperation' was given to avoid becoming involved in a 'court proceeding' with a 'duly authorized organization.'" 372 U.S. at 63. Likewise, the Seventh Circuit in *Backpage.com* noted that Sheriff Dart's threats worked because "just two days after Dart's letter was sent, the Cook County Sheriff's Office was able to (and did) issue a triumphant press release captioned 'Sheriff Dart's Demand to Defund Sex Trafficking

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"it insured New York residents for intentional, reckless, and criminally negligent acts with a firearm that injured or killed another person." App. 31-32. But that finding contradicts the well-pleaded allegations of the Complaint, which states that Carry Guard provides coverage "for expenses arising out of the lawful self-defense use of a legally possessed firearm." *Id*. at 199-200 ¶ 21. Moreover, the Complaint notes that the supposed affinity-insurance marketing violations that formed the basis for the consent decrees against Chubb, Lockton, and Lloyd's were extremely common throughout the industry and had never previously been the subject of regulatory action. *Id*. at 207-08 ¶¶ 36-37, 237 ¶¶ 112-13.

Compels Visa and MasterCard to Sever Ties with Backpage.com.' " 807 F.3d at 232.[11]

Likewise, in *Backpage.com*, the court found it significant that, in response to Sheriff Dart's letter, Visa and MasterCard refused to process *any* payments for ads on Backpage's website, not just those pertaining to illegal products or services. *Backpage.com*, 807 F.3d at 231. So too in this case, Lloyd's and Lockton announced they were cutting all ties with the NRA in response to Vullo's threats, and Chubb, Lockton, and Lloyd's entered into Consent Orders forbidding them from participating in *any* NRA-endorsed programs in New York—regardless of whether such programs comply with the Insurance Law. App. 209-10 ¶¶ 42-43, 214-16 ¶¶ 54-57, 218-19 ¶¶ 62-63, 224-25 ¶¶ 72-74.

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The circuit split between the Second Circuit's decision below and *Backpage.com* is glaring and involves

[11] The Second Circuit cites *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544 (2007) for support, App. at 21-22, but *Twombly* only shows how far afield the Second Circuit's analysis strays. In *Twombly*, the plaintiffs did not "directly allege illegal agreement" but instead relied *entirely* on allegations of parallel conduct to support their claim of an antitrust conspiracy. *Twombly*, 550 U.S. at 565 & n.11. *Twombly* makes clear that the pleading would have passed muster had the plaintiffs made such direct allegations. *Id*. Here, by contrast, NRA directly and plausibly alleges that Vullo made "clear and unambiguous" threats to insurers that they "cease[ ] providing insurance to gun groups, especially the NRA" at meetings in February 2018. App. 199-200 ¶ 21. And the NRA includes direct testimonial statements from the insurers themselves confirming that threats were made. *Id.* at 209 ¶ 42; S. App. 29 ¶ 70.

a critical issue of First Amendment law: how to assess whether and when communications from powerful regulators cross the line from persuasion to coercion. Both government regulators and regulated parties require clear guidance on this issue—particularly when, as the Second Circuit suggests, financial regulators are beginning to focus on "corporate social responsibility" regarding "social issues." App. 10, 30.

B. Targeting the NRA Because Its Views Are Disfavored Is Unconstitutional

The Second Circuit also concludes that "it was reasonable for Vullo to speak out about the gun control controversy and its possible impact on DFS-regulated entities" because of the "general backlash" against the NRA "and businesses associated with [it]," which "was intense after the Parkland shooting." *Id.* at 29-30. Thus, the Second Circuit holds that a "general backlash" against a controversial speaker might justify pressuring companies to stop doing business with the speaker, purportedly because public "backlash" regarding "social issues" could "affect New York financial markets" amid an "age of enhanced corporate social responsibility." *Ibid.*

This language underscores that the Second Circuit accepts that Vullo was acting as a regulator—not merely speaking out as a speaker—in making her statements. Otherwise, the question whether Vullo's Guidance Documents and Press Release were "reasonable" or not would be irrelevant. Government officials,

and even government agencies, are free to speak unreasonably as well as reasonably, if all they are doing is speaking rather than threatening.

But, more importantly, the Second Circuit's reasoning eviscerates the First Amendment, giving government regulators free rein to selectively target unpopular speakers in the name of "tak[ing] action to address key social and environmental issues." *Id*. at 30 n.14. Such a rule would let government officials create a heckler's veto over controversial speech: gin up outrage over any viewpoint related to "social issues," and speakers advocating that viewpoint can be financially deplatformed. Yet both this Court and the lower courts have repeatedly rejected the notion that the government's pursuit of its regulatory goals might justify blacklisting unpopular speakers.

For example, in *Forsyth County* v. *Nationalist Movement*, this Court made clear that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." 505 U.S. 123, 134 (1992). "Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob"—even when the burden is just a modest security fee, capped at $1000, that could be varied based on "the cost of police protection from hostile crowds." *Id*. at 134-35 n.12. That is no less true if the speech generates a "general backlash" that is "intense" and "could (and likely does) directly affect the New York financial markets." App. 29-30.

Likewise, in *Bible Believers* v. *Wayne County, Michigan*, the Sixth Circuit held that Wayne County violated the First Amendment when it ejected self-described Christian evangelists "preaching hate and denigration to a crowd of Muslims" at a festival celebrating Arab American culture, prompting an angry, hostile and violent reaction from the crowd. 805 F.3d 228, 234 (6th Cir. 2015) (en banc). The decision "reaffirm[ed] the comprehensive boundaries of the First Amendment's free speech protection, which envelopes all manner of speech, even when that speech is loathsome in its intolerance, designed to cause offense, and, as a result of such offense, arouses violent retaliation." *Ibid.* "An especially egregious form of content-based discrimination," the Sixth Circuit noted, "is that which is designed to exclude a particular point of view from the marketplace of ideas." *Id*. at 248. "A review of Supreme Court precedent firmly establishes that the First Amendment does not countenance a heckler's veto." *Ibid.*

Public "backlash" against speech, then, cannot justify restricting the speech. It cannot justify shutting down speakers. It cannot justify imposing even modest security costs on speakers. It equally cannot justify threatening financial institutions—of the sort that are necessary for an effective advocacy group to operate—with regulatory sanctions if they do business with a group whose views are disfavored by government officials.

C. These Grave Errors on the Second Circuit's Part Should Lead to Summary Reversal, or to Plenary Review

This Court has used its certiorari jurisdiction to correct decisions like the Second Circuit's that threaten fundamental First Amendment rights. See Shapiro, Geller, Bishop, Harnett & Himmelfarb, SUPREME COURT PRACTICE § 4.13, at 272 (10th ed. 2013) (noting "First Amendment cases" as among the "several prominent types of cases in which the Court seems to have granted certiorari predominantly to correct an erroneous ruling on the particular facts").

Further, this Court frequently has exercised its "summary reversal procedure . . . to correct a clear misapprehension of the qualified immunity standard." *Brosseau*, 543 U.S. at 198 n.3; see also *Mullenix* v. *Luna*, 577 U.S. 7 (2015); *Taylor* v. *Barkes*, 575 U.S. 822 (2015); *Stanton* v. *Sims*, 571 U.S. 3 (2013). This includes erroneous grants of immunity. See *Lombardo*, 141 S. Ct. 2239; *Sause*, 138 S. Ct. 2561; *Hernandez* v. *Mesa*, 137 S. Ct. 2003, 2005 (2017); *Tolan*, 572 U.S. 650. In particular, this Court has summarily overturned qualified immunity decisions that disregard the applicable pleading standard and refuse to believe factual allegations and draw reasonable inferences in favor of the non-moving party. *Lombardo*, 141 S. Ct. 2239; *Sause*, 138 S. Ct. 2561; *Tolan*, 572 U.S. 650.

In ruling on a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."

Tolan, 572 U.S. at 651. So too, in ruling on a motion to dismiss, a court must "accept[] the allegations in the complaint as true" and draw all reasonable inferences in favor of the non-moving party. *Hernandez*, 137 S. Ct. at 2005. "Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the non-movant, even when . . . a court decides only the clearly-established prong of the standard." *Tolan*, 572 U.S. at 657.

Here, the Second Circuit refuses to assume the truth of the NRA's well-pleaded allegations and draw reasonable inferences in its favor, as required at this stage. And because of this error, it ratifies Superintendent Vullo's violation of the NRA's First Amendment rights.

II. The Second Circuit's Qualified Immunity Analysis Is Entirely Derivative of Its Rule 12(b)(6) Analysis

The Second Circuit's holding overruling the District Court on qualified immunity[12] is derivative of, and cannot stand apart from, its clearly erroneous First Amendment holding. "[W]here, as here, the Court

[12] Contrary to the Second Circuit's suggestion that the District Court's qualified immunity analysis was "incomplete," App. 22 n.11, the District Court conducted a thorough qualified immunity analysis and found that Superintendent Vullo was not entitled to qualified immunity, because there were disputed factual questions and because the NRA had plausibly alleged that she made "implied threats to Lloyd's and promises of favorable treatment if Lloyd's disassociated with the NRA." App. 74.

of Appeals erred on both the merits of the constitutional claim and the question of qualified immunity, we have discretion to correct its errors at each step." *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 589 (2018) (cleaned up).

In evaluating qualified immunity, "the salient question is whether the state of the law at the time of an incident provided fair warning to the defendants that their alleged conduct was unconstitutional." *Tolan*, 572 U.S. at 656. This Court has "expressly rejected a requirement that previous cases be 'fundamentally similar' or involve 'materially similar' facts." *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002). "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Ibid.* "The unlawfulness of the [official]'s conduct need only be manifestly apparent from broader applications of the constitutional premise in question." *E.W.* v. *Dolgos*, 884 F.3d 172, 185 (4th Cir. 2018). Thus, "a right may be clearly established if a previously identified general constitutional rule obviously applies to the disputed conduct." *Ibid.*

Here, it has long been clearly established that "[a] public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant's direct regulatory or decisionmaking authority over the plaintiff, or in some less-direct form." *Backpage.com*, 807 F.3d at 230-31. Furthermore, *Bantam Books*, *Backpage.com*,

and two Second Circuit precedents discussed below—*Okwedy* v. *Molinari*, 333 F.3d 339 (2d Cir. 2003) and *Rattner* v. *Netburn*, 930 F.2d 204 (2d Cir. 1991)—provided ample notice to Vullo that her repeated threats to regulated entities to drop the NRA based on a "general backlash" against its pro-Second Amendment advocacy violated the First Amendment.

Indeed, *Bantam Books*, *Backpage.com*, *Okwedy*, and *Rattner* involved minor government actors with no formal regulatory or prosecutorial power writing letters urging a particular course of action, but not directly threatening any consequences. Here, by contrast, Vullo had vast regulatory authority over the NRA's financial service providers and made direct threats to those providers to get them to cut ties with the NRA. As the ACLU noted in its brief in the District Court, "If true, [the NRA's] allegations represent a blatant violation of the First Amendment." ACLU Br. at p. 2.

In *Bantam Books*, this Court found that the Rhode Island Commission to Encourage Morality in Youth, which had no power whatsoever to "regulate or suppress obscenity" but was "limited to informal sanctions," violated the First Amendment. 372 U.S. 58, 66-67 (1963). That was because the Commission nonetheless "deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim." *Id*. at 67. *Bantam Books* recognized that such attempts at "informal censorship" to advance the state's social goals violated the First Amendment. *Ibid.*

The facts in this case are far more egregious than in *Bantam Books*. Unlike the Rhode Island Commission, which had no power to do anything other than "exhort[] booksellers and advise[] them of their legal rights," Vullo's DFS had vast powers to wield against target entities. *Id*. at 66. As in *Bantam Books*, Superintendent Vullo "deliberately set about to achieve the" financial deplatforming of the NRA—and she admitted this intention in calling upon "all insurance companies and banks doing business in New York to join the companies that have already discontinued their arrangements with the NRA." App. 244. Moreover, as in *Bantam Books*, Vullo "succeeded in [her] aim"—the NRA was dropped by its insurance partners and has struggled to obtain even basic banking services. *Bantam Books*, 372 U.S. at 67; App. 227-29 ¶ 80-84.

In *Backpage.com, LLC*, as noted above, a local sheriff wrote letters to credit card companies "[a]s the Sheriff of Cook County, a father and a caring citizen . . . to request that your institution immediately cease and desist from allowing your credit cards to be used to place ads on websites like Backpage.com." 807 F.3d at 230. He sought contact information for individuals from each company with whom he could "work with on this issue." *Id*. at 233. The Seventh Circuit held that the Sheriff's letter violated the First Amendment, despite the lack of any direct threat, despite the Sheriff's admitted lack of authority to take any official action with respect to Visa and MasterCard, and despite an affidavit from Visa stating that "at no point did" the

company perceive the sheriff to be threatening it. *Id*. at 236.

In *Okwedy*, the Second Circuit considered a letter from a Borough President (Molinari) who lacked any regulatory authority whatsoever. 333 F.3d at 343. In his letter, Molinari sought to "establish a dialogue" with a company that had placed billboards that he found "unnecessarily confrontational and offensive." *Id*. at 341. The Second Circuit held that this letter violated the First Amendment, even though Molinari had no regulatory power of which to speak. The only possible source of regulatory power on Molinari's part to which the Second Circuit pointed was Molinari's passing reference to the fact that the company "own[ed] a number of billboards on Staten Island and derive[d] substantial economic benefits from them." *Id*. at 344.

In *Rattner*, the Second Circuit found that a letter from a village administrator (Netburn) raising "significant questions and concerns" about an advertisement placed in a Chamber of Commerce newsletter violated the First Amendment. 930 F.2d at 206. The letter was printed on Netburn's personal stationary. *Id*. at 205. In it, Netburn raised concerns on behalf of "[m]yself and my neighbors" about the advertisement, expressing his belief that the advertisement "was and is inappropriate and a disservice to those of us who live here and have been strong supporters of our local businesses." *Id*. at 206. Netburn threatened no reprisals, stating only that he "believe[d] that each citizen of Pleasantville deserves and expects answers to" the questions he raised. *Ibid*. Netburn had no authority to

impose any civil or criminal sanctions on the Chamber of Commerce, and neither he nor the village took any further action. *Id*. at 209-10.

Despite Netburn's total lack of regulatory authority and the absence of any direct threat or follow-up action, the Second Circuit found that Netburn's letter violated the First Amendment. It did so based on testimony from Chamber of Commerce witnesses stating that they perceived the letter as threatening, and the fact that the Chamber stopped publishing its newsletter shortly after receiving Netburn's letter. *Id*. at 210.

In this case, by contrast, a powerful government official with enormous regulatory power made direct threats to the NRA's business partners to cease doing business with the NRA or else. She reiterated these threats in formal guidance documents and a press release, issued the same day, that cited backlash against the NRA's advocacy as the reason that "DFS urges all insurance companies and banks doing business in New York to join the companies that have already discontinued their arrangements with the NRA." App. 244. Soon after, she announced major settlements with three of the NRA's largest insurance partners where they agreed to pay large fines and cut ties with the NRA. *Id*. at 214 ¶ 54, 218 ¶ 62.

Taken together, Vullo's backroom threats, her sharply-worded regulatory guidance, her Press Release calling on companies to sever ties with gun advocates, and her announcement of major fines against the NRA's erstwhile insurance partners (who publicly

consented to cease lawful affinity business with the NRA) made her message clear: drop the NRA, or else. In holding that such conduct failed to violate any clearly established right, the Second Circuit's decision departs from this Court's decision in *Bantam Books*, creates a split with the Seventh Circuit's decision in *Backpage.com*, and departs from the legally sound analysis of the Second Circuit's own *Okwedy* and *Rattner* decisions.

CONCLUSION

In *Backpage.com*, the Seventh Circuit asked, "where would such official bullying end, were it permitted to begin?" 807 F.3d at 235. That court recognized that the government officials were trying to threaten financial services companies "with coercive governmental action" "in an effort to throttle" Backpage. *Ibid.* And it recognized that this violated the First Amendment even when the attempt stemmed from disapproval of sexually themed commercial advertising, including "illegal sex-related products or services, such as prostitution." *Id.* at 230. This Court likewise recognized similar coercion in *Bantam Books*.

Here, by contrast, the Second Circuit authorizes government officials to threaten financial services companies with coercive governmental action in an effort to throttle the NRA—targeting it precisely because the government (and many among the public) disapprove of the NRA's political advocacy. Where

indeed would such official bullying end, if the Second Circuit's decision that permits it to begin continues to stand? In the ACLU's words, "[p]ublic officials would have a readymade playbook for abusing their regulatory power to harm disfavored advocacy groups without triggering judicial scrutiny." ACLU Br. at 4.

This Court should reject such governmental tactics by summarily reversing the judgment of the Court of Appeals. In the alternative, the Court should grant the petition for a writ of certiorari, set the case for full merits briefing, and reverse the judgment below.

Respectfully submitted,

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