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 FOR PETITIONER NATIONAL RIFLE ASSOCIATION OF AMERICA

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QUESTION PRESENTED

Does the First Amendment permit a government official to threaten regulated entities with adverse regulatory action if they do business with an advocacy organization, where she does so because she disapproves of its political views or because those views are unpopular?

PARTIES TO THE PROCEEDING

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

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

CORPORATE DISCLOSURE STATEMENT

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

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JURISDICTION

The opinion of the court of appeals was issued on September 22, 2022. The court denied rehearing on November 9, 2022. Petitioner filed a petition for a writ of certiorari on February 7, 2023, which this Court granted on November 3, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . 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."

INTRODUCTION

Financial regulators exercise expansive authority in New York, none more so than the Superintendent of the Department of Financial Services ("DFS"). The DFS Superintendent oversees several thousand banks and insurance companies that manage trillions of dollars of assets in the nation's financial capital. She can grant or deny licenses, launch investigations, impose millions of dollars in fines, appoint monitors, and refer matters for criminal prosecution. That authority is properly exercised to ensure compliance with New York's banking and insurance laws. But when the DFS Superintendent uses that authority to pressure financial institutions to blacklist an organization because she opposes the organization's political speech, she violates the First Amendment.

That is precisely what Petitioner, the National Rifle Association ("NRA"), alleges Respondent, then–DFS Superintendent Maria Vullo, did here. Openly targeting the NRA for its gun promotion advocacy, Vullo issued formal guidance letters and a press release urging *every* bank and insurance company in New York State to "sever[] their ties" with "the NRA or similar gun promotion organizations." Pet. App. 247-48, 250-51; *see also id.* at 243. She promised enforcement leniency to insurers if they halted business with the organization. And she publicly announced consent orders with three long-time NRA insurance partners that imposed multi-million-dollar fines and barred them from entering into even entirely lawful commercial partnerships with the NRA ever again. Those threats worked, as numerous other banks and insurance companies declined to work with the NRA out of fear that Vullo would go after them next.

The district court properly recognized that these allegations, which must be accepted as true at the motion to dismiss stage, were sufficient to state a First Amendment claim. But the court of appeals reversed, dismissing Vullo's campaign as "government speech," as if Vullo had merely penned an op-ed criticizing the NRA.

This Court held sixty years ago in *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), that informal, indirect government efforts to suppress or penalize speech by threatening private intermediaries violate the First Amendment. The alleged abuse of power here makes the tactics used by the Rhode Island Commission to Encourage Morality in Youth in that case look positively genteel. Especially at the motion to dismiss stage, where courts must draw all inferences in the plaintiff's favor, these allegations fully suffice to state a First Amendment violation.

STATEMENT

A. Factual Background

1. During the events that gave rise to this litigation, Respondent Maria Vullo was Superintendent of New York's Department of Financial Services ("DFS"). Pet. App. 191. Vullo was appointed to this position by then-Governor Andrew Cuomo, her long-time political patron, and she served at his pleasure. *Id.* at 198 & n.15; *see also* N.Y. Fin. Servs. L. § 202.[1]

[1] Because this case appears before the Court on review of a motion to dismiss, "all of the factual allegations in the complaint" must be taken "as true." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Except where otherwise indicated, the facts in this

As the Superintendent of DFS, Vullo ran a state agency tasked with overseeing all financial services institutions and insurance companies that do business in New York. N.Y. Fin. Servs. L. § 201(a). In total, the agency regulates over 1,400 insurance companies, with assets in excess of $4.3 trillion, and more than 1,900 financial institutions, with assets in excess of $2.9 trillion. Pet. App. 190-91.

Governor Cuomo created DFS by merging two distinct regulators that had long supervised each industry separately. *Id.* at 201-02; Benjamin M. Lawsky, *Regulating in an Evolving Financial Landscape*, 19 Fordham J. of Corp. & Fin. L. 278, 280 (2014). DFS's head quickly earned the nickname "the new sheriff of Wall Street," and drew comparisons in the press to a monarch. Pet. App. 202.

New York law vests DFS with sweeping licensing, rulemaking, investigative, and enforcement authority. N.Y. Fin. Servs. L. § 102. Among other things, DFS can initiate civil and criminal investigations and civil enforcement actions. Pet. App. 201. These can result in significant monetary penalties. *Id.* at 202. For example, DFS imposed a $150 million penalty on Deutsche Bank for offering financial services to child trafficker Jeffrey Epstein, citing, *inter alia*, the bank's failure to consider the "reputational risk" of such transactions.[2]

Statement are drawn from the Second Amended Complaint ("complaint" hereafter). *See* Pet. App. 187-242.

[2] Consent Order, *Deutsche Bank AG*, No. 20200706 (N.Y.S. Dep't of Fin. Servs. July 6, 2020), https://www.dfs.ny.gov/system/files/documents/2020/07/ea20200706_deutsche_bank_consent_order.pdf.

DFS also has the power to impose other measures, such as appointing a third-party monitor to ensure that a regulated entity complies with state law. *See, e.g.*, Consent Order at 19, *Robinhood Crypto, LLC*, No. 20220801 (N.Y.S. Dep't of Fin. Servs. Aug. 1, 2022). DFS may also refer matters to the state attorney general for criminal enforcement. Pet. App. 201-02; N.Y. Fin. Servs. L. § 301.

Section 302 of New York's Financial Services Law also gives the DFS Superintendent "the power to . . . issue orders and guidance involving financial products and services." N.Y. Fin. Servs. L. § 302(a). This includes directives regarding reputational risk, which can form the basis for fines of hundreds of millions of dollars. The $150 million fine DFS imposed against Deutsche Bank is just one example.[3] DFS also levied a $54.75 million fine against Goldman Sachs for, among other things, failing to consider reputational risk from bonds it offered to a Malaysian company that was paying large bribes to the then-President of Malaysia.[4]

2. Petitioner, the National Rifle Association ("NRA"), is an advocacy organization incorporated in the State of New York. Pet. App. 190. Founded in 1871, the NRA boasts millions of members, *id.* at 190,

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[3] Consent Order at ¶¶ 56-58, *Deutsche Bank AG* (citing failure to adequately scrutinize accounts of a client carrying heightened "reputational risk").

[4] Consent Order at ¶ 10, *Goldman Sachs*, No. 20201021 (N.Y.S. Dep't of Fin. Servs. Oct. 21, 2020), https://www.dfs.ny.gov/system/files/documents/2020/10/ea20201021_goldman_sachs.pdf (citing compliance failures that led to "undue . . . reputational risk").

192-93, and describes itself as "America's longest-standing civil rights organization." *A Brief History of the NRA*, Nat'l Rifle Ass'n, https://home.nra.org/about-the-nra/ (last visited Jan. 8, 2024); *see also* Pet. App. 192-93. "Political speech is a major purpose of the NRA," *id.* at 194, and the organization pursues its advocacy in defense of gun rights and the Second Amendment through a variety of expressive means, from leafletting to lobbying. *Id.* at 194, 203.

Because of its advocacy, the NRA has frequently been targeted by nonprofits and political groups with different views. *Id*. at 205. It has also received significant criticism from elected officials—including Governor Cuomo, who referred to the group as "the enemy" during his time in federal government, *id.* at 196-97, and maintained his campaign against the NRA as Governor of New York, *id*. at 197-99, 210.

Like other organizations operating in New York State, the NRA depends on DFS-regulated banks and insurance companies to carry out its advocacy activities and to service its members. Pet. App. 203-04. The NRA must maintain various insurance policies, including umbrella coverage, to responsibly operate its premises and offer educational programs; it also depends on event-specific coverage for larger conferences and convenings. *Id.* And it requires bank deposit access, wire transfer capabilities, and other basic banking services to conduct its advocacy. *Id.* at 203.

In addition, like many other membership organizations, the NRA has historically offered its members so-called "affinity" insurance programs as a benefit. *Id.* at 204. These programs, which are brokered, serviced, and underwritten by insurance companies, bear

the NRA's name, logo, and endorsement. *Id.* The NRA receives a small percentage of members' premium payments as a royalty. *Id.* at 229.

Beginning in 2000, the NRA contracted with affiliates of Lockton Companies, LLC, to administer and market a variety of affinity insurance policies for NRA members. *Id.* at 204-05. Offerings included life, health, property, and casualty insurance policies. *Id.* at 205. Reflecting its distinct advocacy agenda, the NRA also contracted with Lockton to offer an affinity product known as "Carry Guard," which provides insurance coverage for expenses arising out of the use of a legally possessed firearm in self-defense. *Id.* at 205. The Carry Guard program was underwritten by an insurance company doing business as Chubb. *Id.* Insurance giant Lloyd's also offered other affinity insurance products to NRA members. *Id.* at 200, 223. Lockton, Chubb, and Lloyd's "compris[ed] all the issuers of NRA-related policies for the NRA and its members," *id.* at 200; other insurers provided the NRA with corporate insurance and other financial services, *id.* at 209.

3. In the fall of 2017, an advocacy group that opposes the NRA's viewpoint on firearms contacted the New York County District Attorney's Office with information about supposed regulatory defects in the Carry Guard program. *Id.* at 206. The DA's Office referred the matter to Vullo. *Id.*

Soon thereafter, Vullo launched an investigation into Lockton and Chubb that quickly expanded to encompass not just Carry Guard, but insurance products that had nothing to do with firearms. This included policies that were "similar or identical" to affinity policies offered by the New York State Bar Association,

the New York City Bar, the New York Association of Professional Land Surveyors, and the New York State Psychological Association. *Id.* at 207-08, 215-17, 221.

Although Vullo was aware that other entities offered affinity insurance programs with comparable legal defects, Vullo's investigation targeted only policies endorsed by the NRA. *Id.* at 200, 219-20, 223, 225. DFS "verbally conveyed to Lockton that it was only interested in pursuing the NRA" for those violations, explaining that defects in other Lockton-facilitated affinity programs could be quietly remedied after the consent order concerning the NRA affinity policies was entered and publicized. *Id.* at 226.

On February 14, 2018, a teenager in Parkland, Florida opened fire on a high school campus, killing seventeen people. In the wake of the shooting, the NRA faced intensified criticism for its pro-gun rights advocacy from many corners, including Governor Cuomo and Superintendent Vullo.

That same month, Vullo began meeting with insurance executives that did business with the NRA, in which she explained her campaign to penalize the NRA for its gun-promotion advocacy. For example, in meetings with Lloyd's, Vullo "presented [her] views on gun control and [her] desire to leverage [her] powers to combat the availability of firearms, including specifically by weakening the NRA." *Id.* at 221. She acknowledged "widespread regulatory issues" across Lloyd's' affinity offerings, but "made clear that Lloyd's could avoid liability for infractions relating to other, similarly situated insurance policies, so long as it aided DFS's campaign against gun groups." *Id.* at 223; *see also id.* at 199-200. Following these meetings, "Lloyd's agreed that it would instruct its syndicates to

cease underwriting firearm-related policies and would scale back its NRA-related business." *Id.* at 223. In exchange, DFS agreed to "focus its forthcoming affinity-insurance enforcement action" against Lloyd's "solely on those syndicates which served the NRA, and ignore other syndicates writing similar policies." *Id.*

On or about February 25, Lockton's chairman placed a "distraught phone call to the NRA," and "confided that Lockton would need to 'drop' the NRA" for "fear of 'losing [our] license' to do business in New York," even though he wished to continue their business relationship of nearly twenty years. *Id.* at 209. On February 26, Lockton tweeted that it would discontinue brokerage services for all NRA-endorsed insurance programs. *Id.* at 210.

Days later, the NRA's longtime "corporate carrier," AIG, which had previously stated that it was willing to renew the NRA's general liability and umbrella insurance policies "on favorable terms consistent with the NRA's favorable claims history," "abruptly reversed its position," "stat[ing] that it was *unwilling to renew coverage at any price*." *Id.* (emphasis in complaint). It did so "because it learned of" Vullo and Cuomo's "threats directed at Lockton and feared it would be subject to similar reprisals." *Id*.

On April 19, 2018, Vullo escalated her campaign against the NRA by invoking her statutory authority to issue official regulatory guidance letters to the heads of all licensed banks and insurers doing business in New York. N.Y. Fin. Servs. L. § 302(a). The letters (hereafter, the "Guidance Letters") were titled "Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations." Pet. App. 211, 246-51.

In the Guidance Letters, Vullo emphasized "the social backlash against the [NRA] and similar organizations that promote guns that lead to senseless violence." *Id.* at 247, 250. She praised those speaking out after the Parkland tragedy for offering "a strong reminder that [they] can no longer be ignored" and that change must happen "now." *Id.* at 247-48, 250-51. She cited financial institutions that had "severed their ties with the NRA." *Id.* at 247, 250. She "encourage[d]" DFS' "insurers" and "its charted and licensed financial institutions" "to continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations." *Id.* at 248, 251. She invoked "compliance with applicable laws" and "with their own codes of social responsibility." *Id.* And she specifically "encourage[d] regulated institutions to review any relationships they have with the NRA or similar gun promotion organizations and to take prompt actions to managing [sic] these risks and promote public health and safety." *Id.*

The same day, Vullo and Governor Cuomo issued a joint press release announcing the Guidance Letters. *Id.* at 212-13, 243-45. In the release, Vullo proclaimed 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, and to take prompt actions to manage the[ ] risks and promote public health and safety." *Id.* at 244. The release noted that "MetLife, a major insurer regulated by DFS," had "recently announced it was ending a discount program it offered with the NRA." *Id.* It also reported that "Chubb, another DFS-regulated insurer," likewise "recently stopped

underwriting the NRA-branded 'Carry Guard' insurance program." *Id.*

In the release, Governor Cuomo underscored that the risk of doing business with the NRA was not just "a matter of reputation." *Id.* at 244. He stated, "I am directing the Department of Financial Services to urge insurers and bankers statewide to determine whether any relationship they may have with the NRA or similar organizations sends the wrong message to their clients and their communities." *Id*. 243-44.

The following day, Cuomo tweeted: "The NRA is an extremist organization. I urge companies in New York State to revisit any ties they have to the NRA and consider their reputations, and responsibility to the public." *Id.* at 213; J.A. 2.[5]

Two weeks later, DFS announced the conclusion of its investigations into Chubb and Lockton, the insurers that had offered the Carry Guard policies. Vullo imposed multi-million-dollar fines on both companies, and obtained consent orders in which they agreed not only to halt the Carry Guard program, but also *never* to offer any affinity insurance programs with the NRA *again*. *Id*. at 214-15, 218-19, 268-72, 287-90. The agreements allowed the insurers to provide coverage

[5] Shortly after the NRA filed this lawsuit, Governor Cuomo publicly reiterated that the purpose of his regulatory actions against the NRA was to "shut them down." *See* Matt Ford, *Andrew Cuomo's Trumpian War on the NRA*, New Republic (Aug. 28, 2018), https://newrepublic.com/article/150933/andrew-cuomos-trumpian-war-nra; *see also* J.A. 21 (Aug. 3, 2018 tweet from Cuomo stating that "[t]he regulations NY put in place are working. We're forcing NRA into financial jeopardy. We won't stop until we shut them down"); J.A. 23 (Aug. 3, 2018 tweet from Cuomo stating, "If I could have put the @NRA out of business, I would have done it 20 years ago.").

to the NRA itself, or to assist the NRA in procuring corporate coverage, but forbade each entity from "enter[ing] into any agreement or program with the NRA to underwrite or participate in *any* affinity-type insurance program involving *any* line of insurance," *id.* at 270, 289 (emphasis added).

Within a week of DFS announcing the consent orders with Chubb and Lockton, Lloyd's also directed all its underwriters to terminate all insurance programs associated with the NRA, and not to provide any insurance to the NRA in the future. *Id.* at 224; *see also* Sealed Pet. App. 64. This was part of the plan Lloyd's had agreed to with DFS in backroom meetings: Lloyd's would do this "in exchange" for DFS "focus[ing] its forthcoming affinity-insurance enforcement action" only "on those syndicates which served the NRA." Pet. App. 223. In December 2018, this investigation also resulted in a consent order that imposed a multi-million-dollar fine and barred Lloyd's from providing any affinity insurance programs with the NRA, including fully lawful offerings, in perpetuity. *Id.* at 225, 305-07.

Privately, these companies stated that the decision to sever ties with the NRA arose from fear of regulatory hostility in New York. *See, e.g.*, *id.* at 209-10 (noting statements of Lockton and "corporate carrier" AIG); *see also* Sealed Pet. App. 56 (Lloyd's board meeting minutes regarding Lloyd's decision to halt business with the NRA).

The NRA "encountered serious difficulties obtaining corporate insurance coverage to replace coverage withdrawn by the [NRA's] Corporate Carrier," AIG. Pet. App. 227-28. It has "spoken to numerous carriers," but "nearly every carrier has indicated that it fears transacting with the NRA specifically in light of

DFS's actions against Lockton, Chubb, and Lloyd's." *Id.* at 228.

In addition, numerous banks withdrew bids for the NRA's business after Vullo issued the Guidance Letters. *Id.* Though the NRA "received enthusiastic responses from several banks" when it sought bids for "wholesale banking services necessary to the NRA's advocacy" in February 2018, *id.* at 209, "multiple banks withdrew their bids" after Vullo's Guidance Letters issued "based on concerns that any involvement with the NRA . . . would expose them to regulatory reprisals." *Id.* at 228.

B. Procedural Background

The NRA sued Vullo, Cuomo, and others. Pet. App. 191. As relevant here, the NRA claimed Vullo abused her regulatory muscle to punish the organization for its First Amendment–protected speech and to suppress its future speech, in violation of this Court's holding in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).[6]

Vullo moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), which the district court denied in relevant part. Pet. App. 94-184. The court recognized that the NRA's "'gun promotion' advocacy," "[h]owever controversial it may be," constitutes "core political speech entitled to constitutional protection." *Id.* at 111. And it explained that government action

[6] The NRA also sued DFS and Cuomo, and brought Due Process Clause, Equal Protection Clause, and business tort claims against Vullo and her co-defendants. Those claims and co-defendants are not before this Court.

targeting speech based on its viewpoint is "presumptively unconstitutional." *Id.* (citation omitted).

While acknowledging that mere government speech condemning a particular viewpoint would not violate the First Amendment, *id.* at 114, the district court reasoned that such speech crosses a First Amendment line when it constitutes an "attempt[] to coerce," *id.* at 116 (citation omitted). It held the NRA had sufficiently alleged that Vullo had crossed this line.

To reach this conclusion, the court reviewed the allegations in the complaint as a whole and pointed to several factual allegations in particular, including:

- Vullo's extensive regulatory authority over the banks and insurance companies she targeted, *id.* at 119-20;
- her exercise of that authority against several insurers, coupled with alleged communications warning "that they would face regulatory action if they failed to terminate their relationships with the NRA," *id.* at 121-22 (citation omitted);
- the timing of the consent orders, announced just two weeks after the Guidance Letters, which "suggests that the timing was intended to reinforce the message that insurers and financial institutions that do not sever ties with the NRA will be subject to retaliatory action," *id.*;
- the language of the Guidance Letters and press release which, when read against the backdrop of the enforcement actions and "backroom exhortations," "could reasonably be interpreted as threats of retaliatory

enforcement against regulated institutions that do not sever ties with the NRA," *id.* at 124; and

- the reactions of targeted entities, many of whom cut ties with the NRA in the wake of Vullo's "implicit threats of adverse action," *id.* at 125-26.

Several years later, with discovery stymied by disputes over nearly every document, Vullo again moved to dismiss under Rule 12(b)(6), now asserting for the first time that she was entitled to qualified immunity. *Id.* at 42, 70-71. The district court disagreed, reasoning that it had been "clearly established" that the "chilling effect of governmental action . . . that can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the [intermediary's] failure to accede to [an] official's request" violates the First Amendment. *Id.* at 73.

The court of appeals reversed, but on broader grounds. It acknowledged Vullo "plainly favored gun control over gun promotion" and "sought to convince DFS-regulated entities to sever business relationships with gun promotion groups," but held the NRA had failed to plausibly allege unconstitutional coercion in violation of the First Amendment. *Id.* at 28.

Considering each of Vullo's actions in isolation, it treated them all as either government speech or legitimate law enforcement. The panel determined "as a matter of law" that the Guidance Letters and press release Vullo issued "cannot reasonably be construed as being unconstitutionally threatening or coercive." *Id.* at 27-28.

It stated that Vullo's alleged backroom statements to Lloyd's, namely that she was seeking to leverage her authority over financial institutions to weaken the NRA and offering leniency if Lloyd's cut its ties with the NRA, presented a "closer call." *Id.* at 31. But it dismissed the conduct as nothing more than "natural . . . steps" to "enforce the law." *Id.* at 33-34. And it held that the consent orders were justified by violations associated with the Carry Guard affinity insurance program, while noting that the orders allowed the insurers to provide corporate coverage to the NRA itself. *Id.* at 31-32. The panel did not meaningfully address the fact that each order barred the insurers from providing *any* affinity insurance with the NRA, including fully lawful policies, going forward.

The panel therefore concluded that Vullo had not impermissibly communicated any implicit threats, and that the NRA's complaint had not stated a claim for relief under the First Amendment. For much the same reasons, it also held Vullo would have been entitled to qualified immunity even if the NRA had plausibly pled a First Amendment claim. *Id.* at 34-37.

This Court granted review of the court of appeals' dismissal of the NRA's First Amendment claim on the merits. It denied review of the qualified immunity determination.

SUMMARY OF ARGUMENT

Had Superintendent Vullo directly imposed a burden on the NRA because she opposed its gun-promotion advocacy, her actions would have indisputably violated the First Amendment. That she did so indirectly, by pressuring banks and insurance companies to blacklist the group for its "gun promotion" views,

does not change the result. As this Court held in *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), informal efforts to suppress or penalize speech by threatening private intermediaries violate the First Amendment just as much as direct censorship.

Government officials may of course express their opinions without violating the First Amendment. If Vullo had written an op-ed criticizing the NRA, she would not have violated the First Amendment. Likewise, had Vullo merely informed regulated entities about the legal requirements pertaining to affinity insurance programs, she would not have violated the First Amendment.

But Vullo did nothing of the sort. Instead, motivated by her avowed antipathy toward the NRA's political views, she invoked her unparalleled authority over the trillion-dollar New York financial services industry to coerce banks and insurance companies to blacklist the NRA, offering a blend of threats and inducements expressly designed to penalize the NRA for its political advocacy. That course of conduct violated the First Amendment.

1.A. The First Amendment prohibits government officials from penalizing speakers based on their disagreement with the speakers' views. Although officials are free to speak out against specific viewpoints or speakers, they may not use their regulatory power to pressure private parties into penalizing disfavored speakers. Officials cross the line from permissible persuasion to First Amendment-prohibited coercion when they engage in speech or conduct that a reasonable recipient would understand as threatening official retribution if the recipient does not comply with the officials' censorship scheme.

This Court's decision in *Bantam Books*, fortified by decades of application in the circuit courts, establishes three particularly relevant factors to identify coercion or inducement: (1) the authority of the government speaker over those she is addressing; (2) the content and purpose of the communications; and (3) the effect of the government's conduct on its target audience. No one factor is dispositive, and a plaintiff need not establish the presence of all three to state a claim. The ultimate question is whether a reasonable recipient would understand the official's actions as coercive.

1.B. Here, all three factors support the conclusion that the NRA has plausibly alleged a First Amendment violation.

First, Vullo was the "sheriff of Wall Street" overseeing thousands of banks and companies with trillions of dollars in assets at stake, so the companies she targeted had to take her words and actions seriously. She possessed the power to investigate them, revoke or deny their licenses, appoint monitors, impose massive fines, seek injunctive relief, or refer them for criminal prosecution. Vullo's power as Superintendent of DFS and the value of continuing to operate in good standing in the nation's financial capital, particularly compared to the modest amounts to be lost by turning away the NRA's business, gave Vullo outsized influence over the banks and insurers whom she urged to cut ties with the NRA.

Second, Vullo did not merely express her opinion about firearms. She directly invoked her statutory authority, both to issue formal Guidance Letters to every bank and insurance company she oversaw and to investigate and meet with regulated insurers behind closed doors to discuss compliance with her campaign

to weaken the NRA. She formally directed every bank and insurer to take "prompt action" to consider the "reputational risk" of doing business with "the NRA and other gun promotion groups" (but no one else) because their political advocacy is unpopular in New York. Firms are obligated to consider "reputational risk," and failure to do so adequately can and has resulted in multi-million-dollar fines.

Vullo also promised leniency to the NRA's insurance partners if they cut off business with the NRA. And she extracted promises from three of the NRA's insurance partners never to provide affinity insurance to the group ever again—even if those products were fully compliant with New York law. By threatening those who failed to implement her political blacklist and offering inducements to those who did, Vullo sent a clear message to banks and insurance companies: cut ties with the NRA or else.

Third, the organizations subject to Vullo's regulatory authority heard her message loud and clear. Multiple banks and insurance companies did Vullo's bidding, refusing to do business with the NRA. Lockton, an insurer that had worked with the NRA for nearly two decades, stopped in response to Vullo's efforts, explaining it feared losing its license to operate in New York. The NRA's corporate insurance carrier, AIG, abruptly reversed course in negotiating a renewal of the NRA's corporate insurance, refusing to renew under any terms for fear of "similar reprisals." Lloyd's announced it was cutting all ties with the NRA. And multiple banks withdrew their bids to provide services to the NRA after Vullo issued the Guidance Letters.

Taking the NRA's allegations as true, as the Court must at this stage, the complaint thus lays out a

campaign of threats and inducement designed to retaliate against the NRA's protected political speech in violation of the First Amendment.

2. The court of appeals held that these allegations failed to plausibly state a First Amendment violation only by committing a series of analytical errors. First, it mangled basic pleading standards, dismissed or ignored critical allegations of coercion, and failed to consider the cumulative effects of Vullo's actions.

Second, the panel's suggestion that Vullo's political blacklisting campaign was justified because the NRA's unpopularity in New York made doing business with it a "reputational risk" effectively blessed a heckler's veto. In New York, that ruling enables government officials to target groups for their favorable views of gun-promotion; in other states, it would permit government officials to target pro-abortion groups on those same grounds, effectively destroying the very marketplace of ideas the First Amendment is designed to protect.

Finally, DFS's stated concerns regarding the Carry Guard insurance program do not come close to justifying Vullo's actions. She expressly predicated her campaign on the NRA's "gun promotion" advocacy, not its insurance practices. She urged *every* bank and insurance company in New York State to cut *all* business ties with the NRA, not just Carry Guard. And she barred the NRA's three principal affinity insurance partners from providing even fully lawful affinity insurance to the NRA. By her own words and deeds, Vullo made clear that her goal was a political blacklist, not legitimate law enforcement.

ARGUMENT

I. Petitioner Plausibly Pled that Vullo's Pressure on Financial Institutions to Blacklist the NRA Because of Its Political Advocacy Violates the First Amendment

Government officials are free to speak their minds, but not to wield their authority to pressure others to penalize speech based on its viewpoint. The question in this case is whether Vullo merely expressed her views, or whether she violated the Constitution by dragooning the private financial entities she regulated to blacklist the NRA and other gun promotion groups. The NRA pled ample facts to support its claim that Vullo's course of conduct—which she took based on acknowledged animus toward the NRA's viewpoint—falls into the latter bucket.

A. The First Amendment Prohibits Government Actors from Coercing Intermediaries to Penalize Disfavored Speakers

1. Viewpoint Discrimination Is Presumptively Unconstitutional, Whether Effectuated Directly or Indirectly

"Ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional." *Rosenberger v. Rectors & Visitors of Univ. of Virginia*, 515 U.S. 819, 830 (1995). That maxim holds "[e]specially" true where government action "suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 785-86 (1978).

That describes to a T what Vullo did here. Her avowed purpose was to penalize the NRA for its gun-promotion viewpoint—not because that viewpoint conflicted with New York's banking and insurance laws, but because she personally favored the other side of a charged political debate. She announced that purpose in the very subject lines of the Guidance Letters she issued using her authority as Superintendent. With Governor Cuomo's participation, she doubled down in the press release that accompanied the Letters. And behind closed doors, she told Lloyd's that she was seeking to leverage her regulatory authority to weaken the NRA. In short, she made it no secret that her purpose was to penalize an advocacy group because she opposed its political views.

Directly imposing any penalty on the NRA for that reason would be "presumptively unconstitutional." *Rosenberger*, 515 U.S. at 830. Yet Vullo insists that because she did not directly impose a formal sanction on the group, her actions are permissible. They are not.

The First Amendment's prohibition on viewpoint discrimination protects speakers not just from formal bans, but from "varied forms of governmental action." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958) (collecting cases). This includes all manner of economic burdens, including the imposition of a tax, *Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 582-83 (1983), the "denial of a tax exemption," *Speiser v. Randall*, 357 U.S. 513, 518 (1958), exclusion from a benefit, *Rosenberger*, 515 U.S. at 830, and a bar on access to publishing proceeds, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

That principle holds regardless of whether the government imposes the burden directly or through a private intermediary. In *NAACP v. Alabama ex rel. Patterson*, for example, the Court invalidated an attempt by Alabama officials to penalize and undermine the NAACP by requiring disclosure of its membership lists to a hostile public. The Court rejected Alabama's argument that private reprisals occasioned by the disclosure could not be attributed to the State, holding that "[t]he crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold." 357 U.S. at 463. Put simply, the government cannot rely on third parties to achieve censorship objectives it could not constitutionally achieve on its own.[7]

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[7] Government enlistment of private organizations to punish groups advocating disfavored views has an ignoble history in our nation. It includes the blacklists of the McCarthy era, formally imposed by defense contractors, universities, and other private entities. *See* Ellen Schrecker & Phillip Deery, *The Age of McCarthyism: A Brief History with Documents* 72-73, 79-81 (universities), 81 (defense contractors), 81-82 (maritime industry), 74 (General Electric & U.S. Steel) (3d ed. 2017). It also includes efforts to prevent distribution of writings the government viewed as unpatriotic. *See, e.g.*, *Council of Def. of State of N.M. v. Int'l Mag. Co.*, 267 F. 390, 410-11 (8th Cir. 1920) (state campaign to make newsdealers stop selling Hearst publications because the state took the view that the publisher was "un-American"). And it includes Southern states enlisting "Citizens' Councils" and private businesses to punish the NAACP and other civil rights groups for their advocacy. For example, states passed laws that required the NAACP to disclose lists of members and others that required individual employees to disclose the organizations to

2. Indirect and Informal Campaigns to Penalize Speech Raise Heightened First Amendment Concerns

When the government seeks to induce third parties to penalize speech, those indirect censorship efforts are particularly dangerous and unconstitutional for three reasons.

First, every speaker or association depends on the support of third parties. "An author may write a novel, but he will seldom publish and distribute it himself. A freelance reporter may write a story, but he will rarely edit, print, and deliver it to subscribers." *McConnell v. FEC*, 540 U.S. 93, 251 (2003) (Scalia, J., concurring in part and dissenting in part). "To a government bent on suppressing speech," these intermediaries thus "present[] opportunities: Control any cog in the machine, and you can halt the whole apparatus." *Id.*

Second, private parties often have little if any incentive to protect a particular disfavored speaker. As compared to the author of an objectionable book, for example, "[t]he distributor who is prevented from selling a few titles is not likely to sustain sufficient economic injury" to object. *Bantam Books*, 372 U.S. at 64 n.6. Third parties are therefore especially susceptible to government demands—making them

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which they belong, with the expectation that the Citizen Councils would publish that information and trigger economic, and in some cases physical, retaliation. *See* Numan V. Bartley, *The Rise of Massive Resistance: Race and Politics in the South During the 1950's* 193, 213-21 (1969); Charles M. Payne, *I've Got the Light of Freedom* 34-35, 43 (2007); Stephanie R. Rolph, *Resisting Equality*: *The Citizens' Council 1954-1989* (2018).

something of a soft underbelly for government censorship.

Finally, where the government acts indirectly to suppress speech by improperly pressuring private parties, it "eliminate[s] the safeguards" associated with more formal and direct processes. *Id. at* 69. For example, rather than prosecuting an author under the obscenity laws—which would give the author an opportunity to defend her work and would trigger a suite of procedural safeguards—government actors who pressure booksellers bypass these protections altogether. Government coercion or inducement of third parties thus "creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law." *Id*. at 69-70.

The Court has accordingly long recognized that robustly enforcing the First Amendment means warding off not just direct government censorship, but also indirect and informal schemes aimed at achieving the same ends through third parties.

3. To Distinguish Permissible Government Speech from Impermissible Coercion, Courts Ask Whether a Reasonable Recipient Would Understand the Government's Actions as a Threat or Inducement

Identifying impermissible coercion meant to unconstitutionally penalize speech requires line-drawing sensitive to the many ways government power can be abused. Public officials are generally free to share their views on matters affecting the community and to provide advice and information to those they regulate. But they cannot hide behind that

privilege to stamp out particular viewpoints, no matter how controversial. Thus, when an official urges private parties to disassociate from a disfavored speaker, the Court's task is to "look through forms to the substance" of the official's actions, to determine whether she crossed the line from permissible persuasion or advice to impermissible coercion or inducement. *Bantam Books*, 372 U.S. at 67-68.

The leading case on indirect censorship, *Bantam Books*, instructs how to draw this distinction. There, a state agency, the Rhode Island Commission to Encourage Morality in Youth, waged a pressure campaign against booksellers to censor books it believed undermined "youthful morals." *Id.* at 61, 71. The Commission, working in coordination with local law enforcement, sent dozens of letters on official stationery notifying booksellers that "certain designated books or magazines" they distributed "had been reviewed by the Commission and had been declared by a majority of its members to be objectionable for sale, distribution or display to youths under 18 years of age." *Id.* at 59-61.

The publishers of the books sued, arguing that the Commission's tactics against third-party booksellers violated their First Amendment rights. This Court agreed. Although the Commission had not directly made it illegal to sell certain books, nor penalized any distributor for doing so, the Court concluded that the Commission had nevertheless carried out "a scheme of state censorship." *Id.* at 72.

To draw the line between regulatory actions that would have permissibly "advise[d]" the booksellers and those designed "to suppress" speech in contravention of the First Amendment, this Court looked to

whether a targeted third party would "reasonably underst[and]" the government's communications as a threat to stop doing business with a particular speaker or face adverse consequences. *Id.* at 69. Three factors informed this inquiry: (1) the authority of the government actor, (2) the content and purpose of their communications, and (3) the reactions of those who received the government's message. *See id.* at 72.

Applying that framework, the Court first considered the Commission's power over the distributors. Its authority was "limited to informal sanctions," no bookseller's wares had "been seized or banned by the State," and "no one ha[d] been prosecuted for their possession or sale." *Id.* at 66-67. Nevertheless, the Court noted the Commission still had meaningful powers at its disposal, such as "the threat of invoking legal sanctions" and "other means of coercion, persuasion, and intimidation," *id.* at 67, including close coordination with local law enforcement, *id.* at 63.

The Court also considered the contents and purpose of the Commission's communications with booksellers. The Commission had sent the distributors dozens of letters identifying books as "objectionable," typically "either solicit[ing] or thank[ing]" them for their "cooperation," while "remind[ing]" them of the Commission's "duty" to refer obscenity violations to the state attorney general. *Id.* at 61-63. Local law enforcement would then typically "visit[]" targeted distributors afterward "to learn of what action" the letters had prompted. *Id.*

Finally, the Court looked to the reactions of book distributors who received the Commission's communication. The Court noted that one distributor in particular stopped selling the books in question because he

feared the "public officers' thinly veiled threats to institute criminal proceedings against [him] if [he did] not come around." *Id.* at 68. While the bookseller's "refusal to 'cooperate' would have violated no law," the Court concluded his "compliance with the Commission's directives was not voluntary," for "[p]eople do not lightly disregard" such government communications. *Id.* at 68.

In short, the Commission "deliberately set about to achieve the suppression of publications deemed 'objectionable'" and "succeeded in its aim." *Id.* at 67.

In the six decades since, lower courts applying *Bantam Books* continue to focus on those three considerations: essentially, who said it, what did they say, and what was the effect on the recipient of the message. *See, e.g.*, *Kennedy v. Warren*, 66 F.4th 1199, 1207 (9th Cir. 2023); *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230-32 (7th Cir. 2015); *Okwedy v. Molinari*, 333 F.3d 339, 342-43 (2d Cir. 2003); *R.C. Maxwell Co. v. Borough of New Hope*, 735 F.2d 85, 88 (3d Cir. 1984); *see also* BIO at 23 ("[s]ince *Bantam Books*, the circuits have used equivalent tests").[8]

[8] Some courts, including the opinion below, Pet. App. 25, purport to consider four factors rather than three. However, the fourth factor they identify, "whether the speech refers to adverse consequences" if the recipient refuses to comply, is simply one aspect of the inquiry into the content and purpose of the communication.

B. Superintendent Vullo Unconstitutionally Coerced the Financial Institutions She Oversaw to Cut Ties with the NRA Because of Its Advocacy

Applying the *Bantam Books* framework here, all three factors strongly support the conclusion that Vullo's alleged course of conduct coerced the financial institutions she regulated into dropping the NRA because of its gun-promotion advocacy. Vullo's direct authority over banks and insurers, her formal and informal communications with those institutions, and the ensuing chill her conduct had on the NRA's business relationships all amply support a plausible inference that Vullo unconstitutionally coerced the financial institutions she regulates to blacklist the NRA because of its protected speech.

1. Superintendent Vullo Exercised Vast Regulatory Authority Over the Financial Institutions She Pressured to Penalize the NRA

To distinguish between permissible persuasion and unconstitutional coercion, the first relevant consideration is the extent to which a given government official possesses regulatory authority over those she addresses. The more power an official has over those she addresses, the more likely that message will be coercive. *Cf. NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (to assess the effect of an employer's speech on employees, courts "must take into account the economic dependence of the employees," which creates a "necessary tendency" to "pick up intended implications" speech "that might be more readily dismissed by a disinterested ear").

Even a modicum of indirect authority may support an inference of coercion. In *Bantam Books*, this Court observed that, although the Commission lacked the "power to apply formal legal sanctions," it still had the authority to initiate investigations and recommend prosecutions. 372 U.S. at 66-67. This power imbued the Commission's "advisory notices" with extra weight, since "[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 68.

Courts of appeals applying *Bantam Books* have reached similar conclusions. In *Backpage.com*, for example, a sheriff waged a letter-writing campaign to pressure major credit card companies to stop processing transactions for an Internet company that advertised sexual services. He argued this was merely an effort at persuasion, because his "department had no authority to take any official action with respect to Visa and MasterCard." 807 F.3d at 236. But Judge Posner, writing for the Seventh Circuit, disagreed. Observing that the sheriff's office "often coordinate[d]" with other law enforcement agencies, and thus could "refer the credit card companies to the appropriate authority," he concluded the sheriff nevertheless possessed authority over the recipients of his letters. *Id.* As in *Bantam Books*, direct supervisory authority was not required; it sufficed that the sheriff could inflict some kind of regulatory pain.

By contrast, in *Kennedy*, 66 F.4th at 1210, the Ninth Circuit rejected a First Amendment coercion claim in part because Elizabeth Warren, the "single Senator" who sent a strongly worded letter to Amazon criticizing its search and "Best Seller" algorithms lacked any "unilateral power to penalize" the

company. In reaching that conclusion, the court of appeals explained a "similar letter" might be "inherently coercive" had it been sent, for example, by "a prosecutor with the power to bring charges," or "some other law enforcement officer." *Id.*

Here, Vullo wielded unparalleled direct authority over the entire banking and insurance sector in New York, supervising more than three thousand institutions. She had enforcement discretion over a vast regulatory code. *See* Statement, *supra* at 3-4; c*f. Nieves v. Bartlett*, 139 S. Ct. 1715, 1727 (2019) (explaining that broad discretion to arrest increases the risk that "some police officers may exploit the arrest power as a means of suppressing speech") (cleaned up). And to enforce that code, Vullo could inflict a range of punitive measures, including direct enforcement actions, the appointment of third-party monitors, millions of dollars in fines, and criminal referrals. Pet. App. 202.

Given these realities, a reasonable insurer would have been in no position to demur when Vullo, at her closed-door meetings with its executives, "presented [her] views on gun control and [her] desire to leverage [her] powers to combat the availability of firearms." *Id.* at 221. Nor could any reasonable bank or insurer ignore her formal guidance directing them to consider the "reputational risk" of associating with the NRA.

2. Superintendent Vullo's Words and Actions Threatened Financial Institutions for Doing Business with the NRA

The content and purpose of a government official's interactions with third parties also play a crucial part

in determining whether the official is permissibly persuading or impermissibly coercing. In considering this factor, courts look to the totality of interactions to assess how a reasonable recipient would understand the government's requests.

Official communications can be coercive even where they do not contain an explicit threat. Indeed, it is the rare case where a government official expressly threatens adverse regulatory action in response to plainly protected expression. Officials are more apt to issue "warnings" or "advisories" that implicitly threaten regulated entities, particularly when they can count on a keenly attentive audience to read the tea leaves. The explicitness of language necessary to effectuate coercion is often inversely correlated with the extent of the government official's regulatory authority over the entities targeted for pressure. A government official who exercises vast authority over entities with trillions of dollars at stake, as Vullo did, need not bang the drum loudly for her regulated entities to fall into line.

Bantam Books again proves instructive. There, the state Commission did not issue any express warning of retaliation. Instead, it merely "thank[ed] the bookseller" for his "'cooperation' with the Commission," then typically "remind[ed]" him of "the Commission's duty to recommend to the Attorney General prosecution of purveyors of obscenity" and informed him that "lists of 'objectionable' publications were circulated to local police departments." 372 U.S. at 62-63. Nevertheless, this Court recognized those statements as "thinly veiled threats to institute criminal proceedings against them if they do not come around." *Id.* at 62-63, 68. The Commission weaponized the

official trappings of state power to imply that failure to comply could have real consequences. *Id.* at 63.

Backpage.com is similar. There, too, the sheriff's communications to credit card issuers lacked any explicit threat. Nevertheless, the Seventh Circuit held they were unconstitutionally coercive because he had invoked the trappings of his office, issuing the letters "on stationery captioned 'Office of the Sheriff,'" 807 F.3d at 231-32, used formal legal terms such as "cease and desist" and "willfully," cited the federal money laundering statute, and promised follow-up communications. *Id*.

Likewise, in *Okwedy v. Molinari*, the Second Circuit—in an opinion joined by then-Judge Sotomayor—concluded that a high-ranking local official engaged in unconstitutional coercion when he messaged a billboard company "[a]s Borough President" to urge the company to take down a religious billboard advertisement. 333 F.3d at 342. In addition to invoking the official's full title, the letter observed that the billboard company "derive[d] substantial economic benefit[]" from working on the official's home turf. *Id*. And, emphasizing the letter-writer's power to punish, it asked the recipient to contact his "legal counsel" to "discuss further." *Id.* at 342, 344.

Here, Vullo's Guidance Letters, press release, backroom conversations, and enforcement actions all signaled coercion aimed at suppressing protected speech. Through this constellation of words and deeds, Vullo made no bones about what she wanted: a blacklist of the NRA.

First, the Guidance Letters did not merely express the personal perspectives of a public official, but were

formal memoranda issued pursuant to Vullo's statutory authority as DFS Superintendent to set forth "guidance." N.Y. Fin. Servs. L. § 302(a). The documents are issued by "[t]he New York State Department of Financial Services," not "Citizen Maria Vullo." Pet. App. 246. And the Guidance Letters were directly addressed to the CEOs of the banks and insurance companies regulated by DFS, not the public writ large. *Id*. at 246, 249.

Second, the Guidance Letters and accompanying press release repeatedly linked banks and insurers' legal obligations to Vullo's exhortations to cut ties with the NRA. The Letters invoke the legal obligation to consider "reputational risk" and urge banks and insurers them "to review any relationships they have with the NRA or similar gun promotion organizations, and to take prompt actions to managing [*sic*] these risks and promote public health and safety." *Id.* at 248, 251. The reference to "reputational risk," in particular, would not be lost on recipients, since failure to consider such risk can lead to multi-million-dollar fines. *See* Statement, *supra* at 14-15.

Third, if regulated entities had any doubt about the "prompt actions" demanded by the Guidance Letters, Vullo made her intentions crystal clear in a press release issued the same day. There, she explained, "DFS" expressly "urges[] all insurance companies and banks" to "discontinue arrangements with the NRA." Pet. App. 244. Driving the point home, the press release noted that "MetLife, *a major insurer regulated by DFS*, recently announced it was ending a discount program it offered with the NRA and Chubb, *another DFS regulated insurer*, recently stopped underwriting the NRA-branded 'Carry Guard' insurance program." *Id.* at 244 (emphases added).

Fourth, although enforcement officials have a legitimate interest in advising regulated entities on how to best comply with the law, *Bantam Books*, 372 U.S. at 72, the Guidance Letters urged banks and financial institutions to cut all ties with the NRA and other groups because of their "gun promotion" advocacy, not because of any legal infraction. *See id.* at 71 ("[A]lthough the Commission's supposed concern is limited to youthful readers, the 'cooperation' it seeks from distributors invariably entails the complete suppression of the listed publications.").

Fifth, in meetings with insurance executives, Vullo expressly tied her threats and actual enforcement actions to continued business with the NRA, dangling both leniency and prosecution for infractions unrelated to any NRA business. Pet. App. 199-200, 208. During a private meeting with Lloyd's executives in February 2018, Vullo allegedly "discussed an array of technical regulatory infractions plaguing the affinity-insurance marketplace" and made clear that Lloyd's "could avoid liability for infractions relating to other, similarly situated insurance policies, so long as it aided DFS's campaign against gun groups." *Id*. at 208, 223 ("DFS communicated to banks and insurers with known or suspected ties to the NRA that they would face regulatory action if they failed to terminate their relationships with the NRA"). And discussing defects in Lockton's insurance policies, DFS "verbally conveyed to Lockton that it was only interested in pursuing the NRA," indicating Lockton could quietly remediate identical violations of New York insurance law for other clients after the consent decree targeting the NRA program had been publicized. *Id.* at 225-26.

Finally, Vullo took concrete steps to demonstrate the full weight of her authority over the targets of her

intimidation campaign. Just two weeks after issuing the Guidance Letters, she publicly rolled out punitive measures against two of the NRA's three principal affinity insurance providers, Lockton and Chubb. A consent order against the third, Lloyd's, followed shortly thereafter. The orders required the firms to pay multi-million-dollar fines and required them to forswear any affinity insurance programs with the NRA. Particularly when viewed against the context of her many public and private threatening statements, these consent orders drove home Vullo's capacity to inflict regulatory pain on institutions that failed to heed her demands.[9]

3. Recipients of Vullo's Messages Fell in Line

How targeted third parties respond to official communications can also inform whether those messages were coercive. *See Bantam Books*, 372 U.S. at 63. The ultimate test for unconstitutional coercion is objective, not subjective. *Id.* at 68. Thus, a target need not actually buckle to official pressure to produce a constitutional violation, and the mere fact that a recipient does what the government asks is not sufficient to establish a violation. *See Backpage.com*, 807 F.3d at 231. Still, real-world reactions can shed light on whether a reasonable recipient would have

[9] The Second Circuit noted that the consent orders allowed the insurance companies to provide direct insurance to the NRA itself. Pet. App. 12. But even if Vullo was not able to extract *all* that she wanted, she was able to penalize the NRA through the bar on lawful affinity insurance even where no law enforcement interest justified doing so. And Lloyd's and Lockton had already announced they were cutting all ties to the NRA prior to DFS entering their respective consent orders. *Id.* at 11-12, 15.

understood the government officials to be threatening retribution if the recipient failed to comply with the officials' censorship scheme.

For that reason, in *Bantam Books*, the Commission's notices were "reasonably understood" as coercive in part because one bookseller's "reaction on receipt of a notice was to take steps to stop further circulation of copies of the listed publications." 372 U.S. at 63, 68. Cases applying *Bantam Books* in the lower courts are of a piece. *See, e.g.*, *Backpage.com*, 807 F.3d at 236-37 (credit card companies cut off controversial website shortly after receiving sheriff's letters); *Okwedy*, 333 F.3d at 339 (billboard company removed controversial advertisements the same day it received a threatening fax from a local government official); *cf. Kennedy*, 66 F.4th at 1211 ("no evidence" Amazon "felt compelled" to make changes "in response to" Senator's letter).

Here, the complaint contains abundant evidence that banks and insurers in New York heeded Vullo's message:

- In February 2018, as Vullo pressured banks and insurance companies to drop the NRA behind closed doors, the Chairman of Lockton said as much, placing "a distraught phone call to the NRA" during which he "confided that Lockton would need to 'drop' the NRA—entirely—for fear of 'losing [our] license' to do business in New York." Pet. App. 209 (alteration in original).
- Just days later, the NRA's corporate carrier, AIG, refused to renew coverage at any price. *Id.* at 210.

- On May 9, 2018, less than a month after Vullo issued the Guidance Letters, and after closed-door meetings with Vullo, Lloyd's terminated all its insurance arrangements with the NRA. *Id.* at 223-24.
- The NRA's three principal affinity insurance partners entered consent orders prohibiting them from carrying even fully lawful affinity insurance with the NRA in perpetuity. *Id.* at 214 (Lockton May 2, 2018), 218 (Chubb May 7, 2018), 225 (Lloyds Dec. 20, 2018).
- When the NRA was forced to look for corporate insurance coverage elsewhere, "nearly every corporate carrier . . . indicated that it fears transacting with the NRA specifically in light of DFS's actions against Lockton, Chubb, and Lloyd's." *Id.* at 228.
- Several banks that had bid for the NRA's business before Vullo's Guidance Letters withdrew those bids in their wake based on fear of regulatory reprisals. *Id.* at 228. [10]

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[10] Others in the industry perceived Vullo's message similarly. In an article for FinRegRag, a financial regulation expert at George Mason University expressed alarm that the April 2018 Letters "appear[ed] to be *inherently* about political speech," and suggested they should be "immediately withdrawn." Pet. App. 213 & n.30 (quoting Brian Knight, *Is New York Using Bank Regulation to Suppress Speech?*, FinRegRag (Apr. 22, 2018)); J.A. 4-8. And a community banker—willing to speak only "on the condition of anonymity"—told *American Banker* magazine that in light of the apparent "politically motivated' nature of the DFS guidance, "[i]t's hard to know what the rules are" or whom to do business with, because bankers must attempt to anticipate "who is going to come into disfavor with the New York State DFS." Pet. App. 228 (quoting Neil Haggerty, *Gun Issue Is a Lose-Lose for Banks (Whatever Their Stance)*, American Banker (Apr. 26, 2018),

These reactions make perfect sense given the targets of Vullo's message. Regulated banks and insurances companies are highly attuned to the numerous ways that a regulator can make life difficult if they do not heed the official's wishes. For that reason, they routinely parse financial regulators' words with the same careful attention that the ancient Greeks once applied to the prophecies of the Oracle at Delphi. *See* Julie Hill, *Regulating Bank Reputation Risk*, 54 Ga. L. Rev. 523, 568-70 (2020); *see generally* Amicus Br. of Financial and Business Law Scholars in Support of Certiorari. New York banks and insurers' reactions thus confirm what common sense suggests: Recipients of Vullo's communications reasonably perceived them as coercive.

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In short, (1) Superintendent Vullo exercised vast regulatory authority over banks and insurance companies, (2) she made public and private statements invoking that authority to coerce both industries into blacklisting the NRA for its "gun promotion" advocacy, and (3) numerous regulated entities responded by cutting established relationships with the NRA or refusing to do business with it, confirming that they reasonably understood her messages as coercive. As pled, this was a plain-as-day abridgment of the NRA's First Amendment rights, and easily suffices to survive a 12(b)(6) motion to dismiss.

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https://www.americanbanker.com/news/gun-issue-is-a-lose-lose-for-banks-whatever-their-stance); J.A. 10-17.

II. The Second Circuit's Contrary Conclusion Rests on Several Fundamental Errors

The opinion below committed multiple errors in concluding that Vullo was merely engaged in lawful government speech. First, the panel drew every inference in Vullo's favor, rather than the NRA's, ignored critical allegations, and considered each of her initiatives in strict isolation without considering their cumulative effect. Second, the court concluded that Vullo was justified in pressing businesses to cut ties with the NRA because its political views had inspired social "backlash" in New York, effectively granting constitutional safe harbor to a heckler's veto. Third, the court gave unwarranted credence to Vullo's concerns about Carry Guard, when Vullo's own words and conduct make clear that her campaign against the NRA and other gun promotion groups had everything to do with their political advocacy, not the legality of Carry Guard.[11]

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[11] The court also erred in framing the dispute as pitting "[t]wo sets of free speech rights" against each other: "those of private individuals and entities and those of government officials." Pet. App. 23. "[T]he government-speech doctrine is not based on the view—which we have neither accepted nor rejected—that governmental entities have First Amendment rights." *Shurtleff v. City of Boston*, 596 U.S. 243, 268 (2022) (Alito, J., concurring in the judgment). "Instead, the doctrine is based on the notion that governmental communication—and the exercise of control over those charged by law with implementing a government's communicative agenda—do not normally 'restrict the activities of . . . persons acting as private individuals.'" *Id.* at 269 (quoting *Rust v. Sullivan*, 500 U.S. 173, 198-199 (1991)). As a result, "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" of others, *id.*, as Vullo did here.

A. The Court of Appeals Failed to Assess the Coercive Effect of Vullo's Actions as a Whole and Inverted the 12(b)(6) Pleading Standard by Drawing All Inferences in Vullo's Favor

The court of appeals concluded that Vullo's actions were not unconstitutionally coercive only by examining each of her actions in isolation, drawing every inference in Vullo's favor, and failing to meaningfully consider critical facts, including her direct imposition of a lifetime prohibition on NRA affinity programs on three insurers in a manner untethered to any legitimate law enforcement justification.

To start, the court improperly refused to assess the cumulative effect of Vullo's campaign against the NRA. In considering the Guidance Letters and press release, for example, it stressed that they "did not refer to any pending investigations or possible regulatory action." Pet. App 29. In its view, this was "perhaps" the "most important[]" fact. *Id.* at 25. But, as this Court already held in *Bantam Books*, 372 U.S. at 66-67, an explicit reference to a particular adverse consequence is not necessary to violate the First Amendment. And that is especially so in the financial sector, where trillions of dollars are at stake and the incentive to read between the lines is correspondingly high. In any event, the Guidance Letters' invocation of banks and insurers' legal obligation to consider "reputational risk" *did* constitute a distinct threat, as failure to adequately manage reputational risk can lead to massive fines. S*ee* Statement, *supra* at 3-4.

The court likewise overlooked the cumulative coercive effects of the consent orders Vullo rolled out against Lockton, Chubb, and Lloyd's, two of which

Vullo announced just weeks after she issued the Guidance Letters. The court noted that the insurers admitted insurance law infractions, thus presumably validating Vullo's investigations. Pet. App. 32. And it twice remarked that the orders allowed the insurers to provide insurance coverage to the NRA itself. *Id.* at 32, 37. But the court offered no analysis whatsoever of the more salient fact that all three orders barred each company in perpetuity from providing even wholly lawful affinity insurance programs with the NRA.

While the court acknowledged that the alleged backroom threats and inducements were "a closer call," *id.* at 31, here, too, it took a blinkered view of Vullo's meaning. With respect to the allegation that Vullo offered to overlook numerous technical infractions if Lloyd's agreed to cut ties with the NRA, the court concluded that in "context" this was not plausibly coercive because DFS's December 2018 consent order with Lloyd's allowed the firm to continue providing some types of insurance coverage to the NRA. *Id.* at 32. But that is a non sequitur; the terms of a deal entered nearly a year later do not disprove anything about the earlier conversation. And, in any event, the court simply ignored the fact that Lloyd's publicly announced on May 9, 2018, that it was ending *all* insurance programs with the NRA, *id.* at 224—a decision made before the December 2018 consent order but after Vullo's backdoor meetings with Lloyd's, the Guidance Letters and press release, and her announcement of consent orders against Chubb and Lockton. The court of appeals likewise ignored the fact that the consent order with Lloyd's barred it from offering even wholly lawful affinity insurance programs with the NRA, a provision fully consistent with Vullo's

campaign to blacklist the NRA with no legitimate law enforcement justification.

The court of appeals also failed to address other critical allegations, including the fact that Lockton's chairman informed the NRA in February 2018 that the insurance company, which had worked with the NRA for nearly twenty years, suddenly "need[ed] to 'drop' the NRA—entirely—for fear of 'losing [its] license' to do business in New York"—and announced that decision to the public the next day. *Id.* at 209. Nor did the court even mention the NRA's allegations that numerous banks and insurers suddenly withdrew their bids and business with the NRA shortly after the Guidance Letters were issued. *Id.* at 227-28.

And while paying lip service to its obligation under Rule 12(b)(6) to draw all inferences in the NRA's favor, the court did the opposite. At every turn, the court bent over backwards to infer that Vullo acted legitimately, notwithstanding her avowed campaign to weaken the NRA because she opposed its political views. In short, the court's conclusion that a regulator openly targeting a group based on its constitutionally protected advocacy amounts to "business as usual" flouts the most basic tenets of the First Amendment and the Federal Rules of Civil Procedure.

B. The Decision Below Improperly Empowered Superintendent Vullo to Exercise a Heckler's Veto Based on Purported "Reputational Risk"

The court also erred in concluding that Vullo was justified in her campaign against the NRA because of the "general backlash against gun promotion groups." Pet. App. 29-30. It reasoned that "a business's

response to social issues" can sometimes "affect its financial stability," and public disapproval of a controversial speaker could "affect New York financial markets." *Id.* at 30. This, the court reasoned, gave Vullo legitimate grounds to pressure companies to stop doing business with the NRA in the name of managing reputational risk. *Id.* at 30.

Blessing this expansive version of "reputational risk" would give government regulators free rein to selectively target unpopular speech, effectively letting regulators invoke a heckler's veto over any viewpoint controversial enough to generate "public backlash." Where, as here, the same government officials are themselves leading the chorus, the concerns are still greater.

This Court has repeatedly rejected the notion that the government can punish speakers, directly or indirectly, because their views are unpopular. "[S]peech 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, for instance, a modest security fee that varied based on "the cost of police protection from hostile crowds." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 & n.12 (1992). Government officials thus cannot penalize speech based on its potential effect on "a hypothetical coterie of the violent and lawless," *Cohen v. California*, 403 U.S. 15, 23 (1971), let alone based on speculation about the effect "general backlash" might have on "financial markets," Pet. App. 30. That kind of conjecture readily becomes an "instrument of arbitrary suppression of free expression of views." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 516 (1939) (invalidating statute that gave government official discretion to refuse parade permits based on his "mere

opinion that such refusal will prevent 'riots, disturbances or disorderly assemblage'").

That is not to say that financial regulators may never advise banks and insurance companies on reputational risks. "Where such consultation is genuinely undertaken with the purpose" of helping regulated entities comply with valid laws and "avoid prosecution under them," government officials generally do not offend the First Amendment. *Bantam Books*, 372 U.S. at 72. But regulators may not invoke risk arising from the protected expression of disfavored views as a hook for pressuring regulated entities to blacklist speakers they oppose on ideological grounds.

Indeed, the NRA and "similar gun promotion organizations," Pet. App. 212, were, to the best of Petitioner's knowledge, the *only* advocacy groups DFS ever singled out for a "reputational risk" guidance based on their unpopular political views. DFS's other invocations of "reputational risk" have concerned unlawful *conduct* directly tied to its statutory mandate to regulate the financial sector—not unpopular *speech*. For example, DFS imposed penalties on Deutsche Bank for doing business with Jeffrey Epstein because he had used funds managed by the bank to fuel his notorious illegal sex trafficking ring. The agency likewise penalized Goldman Sachs for holding funds used to illegally bribe to the President of Malaysia. And Vullo issued formal guidance regarding the "reputational risks" posed by an illegal Wells Fargo incentive compensation program that led its

employees to create 1.5 million unauthorized accounts using customers' personal data.[12]

By contrast, the "reputational risk" assertedly raised by doing business with the NRA arose not from any illegal *conduct*, but expressly from the fact that its political *speech*—"promot[ing] guns"—is subject to "increasing public backlash"—in New York. Allowing unpopular speech to form the basis for adverse regulatory action under the guise of "reputational risk," as Vullo attempted here, would gut a core pillar of the First Amendment.

C. Alleged Deficiencies in the Carry Guard Program Do Not Justify Vullo's Efforts to Blacklist the NRA and Other Gun Promotion Groups

Finally, the court of appeals overindulged Vullo's claimed interest in addressing insurance law infractions in connection with the Carry Guard affinity insurance program. Asserting that the "coverage violated New York law and public policy," Pet. App. 32, the court of appeals concluded that "it was only natural for Vullo to take steps—including investigating, negotiating, and resolving apparent violations—to enforce the law," *id.* at 33.

But even assuming the Carry Guard program violated New York insurance law, that does not begin to explain, much less justify, Vullo's actions. The Guidance Letters, for example, do not even *mention* Carry Guard, and instead single out the NRA solely for its "gun promotion" advocacy. The Letters are addressed

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[12] Guidance on Incentive Compensation Arrangements, 2016 WL 6141359, ¶ 2 (N.Y. Dep't Fin. Servs. Oct. 11, 2016).

to the chief executive officers of more than three thousand banks and insurance companies under DFS's jurisdiction, not just the three insurers involved in the affinity insurance programs offered to NRA members. *Id.* at 246, 249. Moreover, the Letters target not only the NRA but also "*similar organizations that promote guns*," without evidence that those groups offered Carry Guard or anything like it. *Id.* (emphasis added). And they urge regulated institutions to "sever[] their ties" with the NRA, not to avoid Carry Guard. *Id.* at 247, 250. The consent orders, meanwhile, bar the provision of *any* affinity insurance with the NRA, not just Carry Guard.

Had Vullo merely enforced the law with respect to Carry Guard and warned other insurers to avoid violating insurance law through similar programs, that would be a different story. But that is not this case. Vullo's campaign was expressly predicated on the NRA's political views, not the deficiencies of a single affinity insurance program, and her actions swept far beyond remediating any infractions that plagued Carry Guard. That is anything but "legitimate enforcement action," *id.* at 33.

* * *

Superintendent Vullo openly targeted the NRA for its political speech and used her extensive regulatory authority over a trillion-dollar industry to pressure the institutions she oversaw into blacklisting the organization. In the main, she succeeded. But in doing so, she violated the First Amendment principle that government regulators cannot abuse their authority to target disfavored speakers for punishment. Vullo could not have directly imposed even a mild financial sanction on the NRA for its "gun promotion" advocacy.

Bantam Books teaches that she also could not constitutionally achieve the same retaliatory result indirectly through an orchestrated campaign of barely veiled threats and sanctions against the industries she regulated.

CONCLUSION

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

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Respectfully submitted,

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