No. 22-842

In the Supreme Court of the United States

THE NATIONAL RIFLE ASSOCIATION OF AMERICA,

Petitioner,

v.

MARIA T. VULLO,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE FIREARM POLICY COALITION, INC. IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Firearms Policy Coalition, Inc. (FPC) is a nonprofit membership organization that works to create a world of maximal human liberty and freedom.[1] It seeks to protect, defend, and advance the People's rights, especially but not limited to the inalienable, fundamental, and individual right to keep and bear arms. FPC accomplishes its mission through legislative and grassroots advocacy, legal and historical research, litigation, education, and outreach programs. FPC's legislative and grassroots advocacy programs promote constitutionally based public policy. Since its founding in 2014, FPC has emerged as a leading advocate for individual liberty in state and federal courts, regularly participating as a party or *amicus curiae*.

INTRODUCTION

Shortly after this Court held in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022), that the State of New York must allow its law-abiding citizens to carry firearms in public, the State enacted a "sensitive places" law effectively limiting carry to, in the Governor's words, "probably some streets." Luis Ferré-Sadurní & Grace Ashford, *N.Y. Democrats to Pass New Gun Laws in Response to Supreme Court Ruling*, N.Y. TIMES (June 30, 2022), https://nyti.ms/48Tgpgn. Litigation over New York's new and draconian public carry restrictions is ongoing. One might think of the litigation over that

[1] No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* or its counsel, has made a monetary contribution to the preparation or submission of this brief.

bill and other New York laws limiting the right to keep and bear arms as representing the primary battlefield on which the long-running conflict between New York and the Second Amendment rights of its citizens is playing out. Simultaneously, however, the conflict is playing out in other indirect ways, of which this case is a prime example. Not satisfied with limiting the Second Amendment rights of its people directly, New York has sought to cripple the National Rifle Association by cutting it out of the market for financial services and threatening retaliation against those willing to do business with it.

Just as New York's attempts to curtail firearm rights directly violates the fundamental Second Amendment right to keep and bear arms, this indirect strategy violates the equally fundamental First Amendment right to freedom of speech. This case involves multiple clear instances of thinly veiled threats made by both the governor of New York and the head of its powerful financial regulatory department to insurers, banks, and other financial institutions doing business in New York that made it perfectly clear that anyone willing to do business with the NRA would face, at least, intensified regulatory scrutiny, for having the temerity to do business with a politically disfavored organization. That these statements were understood to be threats is demonstrated by the fact that they worked. Several of the NRA's business partners cut ties with the organization, telling the NRA that the only reason for their action was concern with incurring the wrath of their regulators and inviting potential enforcement actions for taking on too much "reputational risk" by doing business with the group. This is a textbook violation of the principle that this Court articulated in

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963), that just as the government cannot directly retaliate against a disfavored group for their speech, it also cannot, indeed *especially* cannot, retaliate against it indirectly by going after third-party intermediaries who do business with the speaker.

In holding that this case does not conflict with *Bantam Books*, the Second Circuit below misapplied the law. It ignored the most important facts: that the defendants possessed immense power over the financial institutions to which they issued their threats and the institutions understood the statements to be threats. And it offered a blinkered reading of the threats that ignored context, including the identity and authority of the speaker. Its approach would, if followed in other cases, mean that only the most brazen threats could possibly be recognized as amounting to a First Amendment violation. Indeed, the Second Circuit's analysis perversely appears to allow the great scope of authority wielded by the defendants to excuse their threats, since, in the Second Circuit's view, issues of "reputational risk" were within the regulator's purview and so appropriately a topic on which she had to keep the regulatory community informed of her views.

The problem this creates should be obvious. New York is a leader in the movement among a small number of states seeking to curtail the Second Amendment rights of their citizens to the maximum extent possible. In this environment, the authority to regulate the "reputational risk" of associating with pro-Second Amendment groups is not a tool that is likely to go unused. Indeed, the recent past is replete with examples of states following New York's lead

when it comes to finding creative new ways to infringe Second Amendment rights, and this case is just one of several that are currently pending that demonstrate the strong animus these states have to groups that will seek to promote and defend the right to keep and bear arms. Indeed, *amicus* is aware of similar tactics currently being used in New Jersey and Washington to try and punish pro-Second Amendment organizations. By protecting core political speech, the First Amendment indirectly protects a host of other rights. But similarly, attacks on First Amendment rights surrounding such speech *threatens* a host of other rights. To ensure that the First Amendment remains protective of all people's rights to take positions on important social and constitutional issues—especially positions that are disfavored by those in power—this Court should make clear that such tactics remain unconstitutional.

SUMMARY OF ARGUMENT

I. The Second Circuit misapplied *Bantam Books* when it held that defendant Maria Vullo's private statements to bankers and insurers, official regulatory guidance, and statements to the press, all focused on emphasizing her animus towards pro-Second Amendment groups like the NRA and underscoring for the regulated entities that association with such organizations constituted a "reputational risk," was constitutionally protected speech and not blatant retaliation against the NRA for taking disfavored political positions. This Court must correct this error, which results from the Second Circuit applying a heightened pleading standard that is inappropriate at this early stage of the case and ignoring the most crucial fact: that these threats were

perceived as threats by their recipients who caved to pressure from Vullo and cut ties with the NRA as a result.

The Second Circuit excused Vullo's actions by largely ignoring the effect that her immense regulatory authority would have had on the import that financial institutions gave to her words while simultaneously using the breadth of her authority to regulate risks to *excuse* those words. This sort of analysis would permit Vullo or her successors in office to enshrine their policy preferences on any important issue in official banking policy and back those preferences up with threats of enforcement actions and fines. If Vullo has authority to regulate "reputational risks" and to unilaterally announce to the financial institutions she regulates which clients or political positions represent unacceptable reputational risks, then she has the *de facto* authority to cut virtually any group with which she disagrees off from the financial sector entirely. Such power obviously poses a grave threat to First Amendment freedoms, especially of groups like the NRA or *amicus* who take positions on important constitutional issues that are regularly opposed by Vullo and others in positions of power. The Second Circuit's decision must be reversed.

II. It is no accident that this issue has arisen in the context of an organization advocating for Second Amendment rights. Vullo is not the first politician with apparent disdain for the people's right to keep and bear arms and she will not be the last. But tactics like hers have spread and will continue to do so if this Court does not send a strong message that the First Amendment rights of organizations promoting the

right to keep and bear arms are just as protected as anyone else's. While New York has, following this Court's decision in *Bruen*, sought to limit the practical effect of that decision directly, a nascent movement to indirectly attack the Second Amendment and those who advocate for a proper understanding of the scope of its protections, that began even before *Bruen* was decided, has picked up steam in recent years. Vullo's tactics in this case are of a piece with tactics by likeminded politicians in other states that look to New York as an example in this area. Indeed, it is arguably *less* egregious than some other assaults on the First Amendment rights of advocacy organizations and corporations who support the Second Amendment, and this Court should make clear that such tactics will not be countenanced.

ARGUMENT

I. The Second Circuit's Decision is Incompatible with *Bantam Books*.

In *Bantam Books*, this Court warned that "the freedoms of expression must be ringed about with adequate bulwarks." 372 U.S. at 66. Those bulwarks, however, are of little value if the government can circumvent them by targeting third parties who do business with an unfavored speaker, even though it would be blatantly unconstitutional for it to target the speaker directly. Determining when a government official is unconstitutionally targeting intermediaries for their lawful interactions with a disfavored speaker requires "look[ing] through forms to the substance" of speech by government actors to see whether they are

unconstitutionally quelling the exercise of First Amendment rights. *Id.* at 67.

The Second Circuit below utterly failed to do that. Although it purported to apply this Court's precedent, in reality it elevated form over substance and ignored the threatening implication of a regulator's statements in formal guidance letters and press releases that were generally addressed to the regulated community as well as more specific statements to parties that were actually doing business with the NRA. As a result, the Second Circuit blessed conduct that was intended to punish the NRA for its speech by shutting it out of the market for insurance products and other financial services.

Focusing on the substance of the statements in question should make this an easy case. It involves a regulator who openly spoke about her dislike of "the NRA or similar gun promotion organizations" and attempted to enshrine her policy preferences as part of the risk-management practices of finance companies doing business in New York. Sitting atop the Department of Financial Services ("DFS"), Maria Vullo headed up an office with authority to regulate any financial institution doing business in New York and to impose massive liability on entities that fail to comply. *See, e.g.*, Menqi Sun, *New York Financial Regulator Notches $100 Million Settlement With Coinbase*, WALL ST. J. (Jan. 4, 2023), https://on.wsj.com/3Hhz5uM. From this immensely powerful position, she made statements to financial institutions that did, *in fact*, cause them to cut ties with the NRA out of a concern that their continued business relationship would attract the regulator's attention. In meetings with insurers regulated by her

agency, Vullo offered her views on gun control and expressed a "desire to leverage [her] powers to combat the availability of firearms, including specifically by weakening the NRA." Pet. App. 221. Vullo also issued official guidance letters, entitled "Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations," to the heads of licensed New York banks and insurers that warned recipients that DFS may consider association with the NRA to constitute a reputational risk that financial institutions would need to account for on their balance sheets. Pet. App. 211, 246–51. And then Vullo, in conjunction with then-Governor Cuomo, issued a press release urging businesses to cut ties with the NRA and to "take prompt action[] to manage the[] risks" of doing business with them. Pet. App. 244. In a tweet following the press release, Governor Cuomo called the NRA "an extremist organization" and reiterated his call for financial institutions to cut ties with them. Pet. App. 213 (quoting Andrew Cuomo (@NYGovCuomo), TWITTER (Apr. 20, 2018, 8:58 AM), https://bit.ly/41ZeR2w).

In analyzing the statements, as well as the actual regulatory enforcement actions against insurers based on their work with the NRA, that are at issue in this case, the Second Circuit purported to analyze Vullo's "(1) word choice and tone, (2) the existence of regulatory authority, (3) whether the speech was perceived as a threat, and, perhaps most importantly, (4) whether the speech refers to adverse consequences" to determine whether her actions had impermissibly threatened those who would do business with the NRA. Pet. App. 25 (citations omitted). But in reality, the Second Circuit improperly gave controlling significance to the first and the last

factor, downplaying the dispositive facts that Vullo had immense regulatory power over the financial institutions to whom she made her threats and that the threats accomplished their aim by causing several regulated entities to cut ties with the NRA. *See* Pet. App. 28–29 ("Although she did have regulatory authority over the target audience, and even assuming some may have perceived the remarks as threatening . . ."). Rather, what really counted for the Second Circuit (the factor it said was "perhaps most important[]") was that the communications were somewhat equivocal in describing the consequences for regulated entities doing business with the NRA or other pro-Second Amendment groups because "the only 'adverse consequences' alluded to were the 'risks, including reputational risks . . . *if any*,' of continuing to do business with gun promotion groups amid growing public concern over gun violence and the 'social backlash' against 'organizations that promote guns that lead to senseless violence.' " Pet. App. 25, 29 (emphasis and ellipsis in opinion). But this analysis inverts *Bantam Books*, in which this Court found the impact of the challenged statements on book distributors to be "particularly relevant" points for analysis and rejected Rhode Island's argument that the blacklists were "mere legal advice" as "naïve," considering rather that the statements served as "instruments of regulation" against the entities they targeted. 372 U.S. at 63, 68–69. While the presence of overtly threatening language would of course make this case even easier, the Second Circuit's crediting its *absence* to Vullo, as though it exonerates her actions, has no basis in *Bantam Books* or in common sense. As other courts have correctly noted, such language will only be present in the "most obvious cases of coercion."

Kennedy v. Warren, 66 F.4th 1199, 1211 (9th Cir. 2023). The Second Circuit would presumably similarly find unthreatening the remarks of a mafioso selling "insurance" to a business owner who idly remarks on what a nice dry-cleaning operation he has and would it not be a terrible shame if it all burned down? Its reasoning leaves speakers unprotected from quite obvious government coercion unless the government is foolish enough to act in a particularly ham-fisted or brazen manner.

In any event, the Second Circuit's piecemeal review of the language understates how brazen Vullo was. Take, for example, the manner in which the Second Circuit treated the language contained in the guidance letter Vullo issued to the heads of New York financial institutions. Contrary to the court's description of the letter, Vullo did not merely say that regulated entities risked "social backlash" and possible "reputational risk" from doing business with the NRA or other pro-Second Amendment organizations. Pet. App. 29. Rather, the letter began by discussing "several recent horrific shootings" and asserted that "society, as a whole, has a responsibility to act and is no longer willing to stand by and wait and witness more tragedies caused by gun violence, but instead is demanding change now." Memorandum from Maria T. Vullo, Superintendent of Fin. Servs., to the Chief Exec. Officers or Equivalent of N.Y. State Chartered or Licensed Fin. Insts. (Apr. 19, 2018), https://on.ny.gov/3TujB7v. It is this societal "demand" that the guidance letter suggests weighs upon the regulated institutions by opening them up to "reputational risks" from "dealing[] with the NRA or similar gun promotion organizations." *Id.* Nevertheless, the Second Circuit accepted this

language as nothing more than legitimate concern from a regulator, since Vullo had authority to regulate risks taken on by financial institutions and, "as research shows, a business's response to social issues can directly affect its financial stability in this age of enhanced corporate social responsibility." Pet. App. 30; *see also* Pet. App. 30 n.14.

And here we hit upon the most important problem with the Second Circuit's decision. This reasoning, if accepted, has the potential to permit a financial regulator like Vullo, who had, as the head of DFS, the authority to fine virtually any major financial institution in the country for failure to properly manage its risks or to deprive them of a license to do business in New York, to enshrine her political positions in banking regulations and cut off any cause with which she disagrees from access to financial services. Never mind that, around the time Vullo issued her guidance letter, she was dramatically overstating the "reputational risk" of working with the NRA, which, while divisive, was viewed positively by about half of the country, *see* Jeffrey M. Jones, *Americans' Views of NRA Become Less Positive*, GALLUP (Sept. 13, 2019), https://bit.ly/4aQh6sJ (showing that 48% of Americans viewed the group favorably and 49% viewed it unfavorably), what matters for the risk assessment of banks and insurers is whether the person sitting at the top of DFS has a negative view of a group's advocacy work.

It would be bad enough if Vullo were only throwing her regulatory weight behind an emergent "heckler's veto" to deprive Second Amendment advocacy organizations of access to financial services, but she herself manufactured that veto in this case,

and then she put enforcement authority behind it by recasting a social debate as an unacceptable risk for a financial institution to keep on their balance sheets. By the same alchemy, Vullo could convert the act of providing banking or insurance services to advocacy organizations working on any cause with which she disagrees into an unacceptable risk. Indeed, this same maneuver was behind the Department of Justice's infamous "Operation Choke Point" which similarly sought to cut off financial services to certain industries (including the firearms industry) on the basis that doing business with them "create[d] a 'reputational risk' sufficient to trigger a federal investigation." STAFF OF H.R. COMM. ON OVERSIGHT AND GOV'T REFORM, 113TH CONG., REP. ON THE DEPARTMENT OF JUSTICE'S "OPERATION CHOKE POINT": ILLEGALLY CHOKING OFF LEGITIMATE BUSINESSES? at 1 (2014). While Vullo sought to punish those promoting Second Amendment rights, it is easy to imagine different regulators latching on to different pet policy issues—be they abortion, LGBTQ rights, the rights of undocumented immigrants, or other controversial issues of the day.

Although this Court acknowledged in *Bantam Books* that the Rhode Island Commission to Encourage Morality in Youth's communications might have been legitimate if they were "attempt[ing] to give distributors only fair legal advice," 372 U.S. at 72, it cannot be that since Vullo "was charged with overseeing insurance entities, banks, and other financial institutions in New York[] . . . she surely had the right to raise these concerns," Pet. App. 30. There is no limit to this principle where the regulator has such broad authority and can push regulated entities, with the (unstated) threat of fine or investigation

always in the background, to cease doing business with anyone speaking out on any issue that she dislikes. If accepted, then rather than weighing *against* her in the First Amendment analysis, the fact that Vullo had authority to make good on her threats would perversely provide cover for her actions. After all, the Second Circuit emphasized that "government officials have a right—indeed, a duty—to address issues of public concern," Pet. App. 5, and with the broad scope of potential "reputational risks" that businesses may encounter, Vullo's duty as head of DFS to speak out on her issues is potentially unlimited, and will immunize her and those in similar positions to essentially legalize her own policy preferences for financial institutions in New York and throughout the country.

To the extent there is any daylight between this case and *Bantam Books*, it is only because Vullo's actions here are considerably more troubling than Rhode Island's were there. After all, as Justice Harlan pointed out in that case, there *were* legitimate grounds on which Rhode Island could possibly regulate the books the Commission targeted in that case; if they really were obscene, then they were not protected by the First Amendment. *Bantam Books*, 372 U.S. at 77–78 (Harlan, J., dissenting). Here, however, Vullo targeted the NRA and other pro-Second Amendment organizations for what is *unquestionably* the sort of "core political speech" that this Court has stressed is entitled to the greatest protection. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). After all, the First Amendment exists "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Buckley v. Valeo*, 424 U.S. 1,

14 (1976) (internal quotation marks omitted). Attempts by New York to curtail such speech—amounting to *de facto* viewpoint discrimination on an issue of significant public importance and debate, *see, e.g.*, *Rosenberg v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995), should elicit the most careful and protective review possible, and should certainly not be lightly dismissed at the pleading stage.

II. Protecting the First Amendment Rights of Organizations Like the NRA Is Critical to Protecting Second Amendment Rights.

It is no accident that this issue has come to this Court for the first time in 60 years in the context of officially sanctioned discrimination by New York against a Second Amendment organization. This Court has frequently reiterated that "the point of all speech protection is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (quoting *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 574 (1995)) (ellipsis omitted). And while in some cases, like *Snyder*, that means that the First Amendment must be read to protect expression even of ideas that society writ large finds "offensive or disagreeable," *id.* (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)), formidable threats to our First Amendment liberties also come in cases involving more evenly divided debate over issues of broad public importance. It is these cases that often push litigants and courts to upset other doctrines, often at the margins at first, in a way that ultimately erodes procedural or substantive protections for everyone. In his dissent in

Hill v. Colorado, Justice Scalia warned that "[t]here is apparently no end to the distortion of our First Amendment law that the Court is willing to endure in order to sustain . . . restriction[s] upon the free speech of abortion opponents." 530 U.S. 703, 753 (2000). And just as "abortion distortion" was the concern then (in the First Amendment context and elsewhere), "gun distortion" is a real threat today as states like New York come up with new stratagems by which to hamper the Second Amendment rights, many of which will have far-reaching impacts on *other* rights and protections if this Court does not strictly police them.

As an antagonist of Second Amendment rights, New York is second to no one. Most recently, of course, it was a New York law requiring an individual to show "proper cause" before acquiring a license and exercising the Second Amendment right to carry a firearm in public that this Court struck down in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), when it established not only that the Second Amendment enshrines a right to public carry of firearms but also that the interest balancing test employed by courts (and capitalized on by New York previously to uphold its draconian firearm laws) was inconsistent with this Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008). But before that case, in an attempt to stave off a decision of this Court disturbing the interest-balancing regime, New York intentionally deprived this Court of jurisdiction in *New York State Rifle & Pistol Association v. City of New York*, 140 S. Ct. 1525 (2020) (per curiam), by amending state law to abrogate the local restriction on transporting firearms that was challenged there and render the case moot. *Id.* at 1526. As Justice Alito noted in, New York's strategy was the sort of gambit

to "manufacture mootness in order to evade review" of which this Court had previously "been particularly wary." *Id.* at 1533 (Alito, J., dissenting).

Following *Bruen*, New York has led the way on a renewed direct assault on the Second Amendment, passing, in an Extraordinary Legislative Session convened specifically for the purpose, a response bill that seeks to minimize the practical impact of *Bruen* by adding new licensing requirements, creating a host of new "sensitive locations" at which carry is entirely banned or strictly curtailed, and even reversing the presumption that individuals may carry on private property in favor of a so-called "no-carry default" that governs unless a property owner gives explicit permission to carry firearms on his or her property. *See Antonyuk v. Chiumento*, Nos. 22-2908 (L), 22-2972 (Con), 22-2933, 22-2987, 22-3237, 2023 WL 8518003, at *3–4 (2d Cir. Dec. 8, 2023). The academics who championed this last novel and uniquely infringing restriction openly declared that "lawmakers should expect that a 'prohibited-unless-permitted' default would radically expand the private spaces where guns could not be carried," and as a result may even "reduc[e] preferences to carry and possess firearms more generally, as it becomes increasingly inconvenient to do so." Ian Ayres & Spurthi Jonnalagadda, *Guests With Guns: Public Support for "No Carry" Defaults on Private Land*, 48 J. L. MED. & ETHICS 183, 184 (2020). In passing this law, New York politicians specifically called for other states to follow its lead in attempting to thwart this Court's decision in *Bruen*. *See, e.g.*, *Governor Hochul Signs Landmark Legislative Package to Strengthen Gun Laws and Protect New Yorkers*, N.Y. GOV'S. PRESS OFF. (June 6, 2022), https://on.ny.gov/4b7Q40n (Governor Hochul

referring to "New York State's nation-leading gun laws," Lieutenant Governor Delgado boasting that "New York is leading the way" passing anti-gun legislation, Letitia James promising "New York will continue to lead in imposing reasonable gun laws that keep our people safe, and I urge other states to follow suit."). And, in fact, several states have done so. *See, e.g.*, Andrew Willinger, *Litigation Highlight: Federal Judge Weighs Maryland's Post-Bruen Sensitive Places Law*, DUKE CTR. FOR FIREARMS LAW: SECOND THOUGHTS BLOG (Oct. 18, 2023), https://bit.ly/420rbj0 ("Following in the footsteps of New York and New Jersey, Maryland enacted S.B. 1 earlier this year . . . . Among other restrictions, the law bans the public carry of firearms at designated sensitive locations and institutes a default ban on carrying firearms on private property without express permission from the property owner.").

This case represents an alternate front in New York's continual conflict against the Second Amendment and those that advocate for a proper understanding of the right. And just as with its direct attack, other states are more than willing to follow New York's lead in its more inventive attempts to thwart the Second Amendment by distorting other constitutional protections and doctrines. For example, in 2021 then-Governor Cuomo announced New York as "the first state in the nation is going to declare a disaster emergency on gun violence," drawing specific parallels between the state's authority to respond to the COVID-19 pandemic and its ability to respond to "the epidemic of gun violence." The Associated Press, *Cuomo Declares State of Emergency Over Gun Violence*, N.Y. TIMES, at 0:17–0:21, 0:54–1:02 (July 6, 2021), https://nyti.ms/3TX4Roo. Following that

blueprint, last year the Governor of New Mexico declared a public health emergency related to gun violence and, with the assistance of her Department of Public Health, made it illegal to carry firearms in public in Albuquerque or the surrounding county. *See We the Patriots, Inc. v. Grisham*, No. 1:23-cv-00771-DHU-LF, 2023 WL 6622042, at *2 (D.N.M. Oct. 11, 2023). The governor eventually (and only partially) backed down after her own attorney general refused to defend the order in court, noting that he did "not believe that the Emergency Order will have any meaningful impact on public safety [and] more importantly, [he did] not believe it passes constitutional muster," and also that it was "not clear that the problem is properly defined as a 'public health emergency.' " Letter from Att'y Gen. Raul Torrez to Gov. Lujan Grisham (Sept. 12, 2023), https://bit.ly/3O2uXCC. Of course the attorney general was right; gun violence is nothing like a public health emergency, but the creative approach pioneered by New York was just the cover the governor—who believed that "[n]o constitutional right, in my view, including my oath, is intended to be absolute" and that she possessed "additional powers" to implement temporary restrictions on the Second Amendment rights of New Mexicans "if there's an emergency," KOB4, New Mexico Gov. Lujan Grisham holds news conference on gun violence at 32:11, YOUTUBE (Sept. 8, 2023), https://bit.ly/3SgWkv6—needed to enforce restrictions more severe than those that this Court had only just held clearly violated the Second Amendment.

Most relevant for this case, New York's attempts to punish the NRA for its advocacy work in violation of the First Amendment is part of a broader campaign

currently being waged nationwide against organizations that seek to promote and defend the right to keep and bear arms. For instance, for the last ten years Defense Distributed—"a Texas company operated for the purpose of promoting popular access to firearms" has been locked in a legal battle over Defense Distributed's publication of computer assisted design files for a single-round, plastic, 3D-printable pistol. *Def. Distributed v. Bruck*, 30 F.4th 414, 421–22 (5th Cir. 2022) ("*Defense Distributed III*"). Defense Distributed's publication of the design files was initially opposed by the United States, on the grounds that publication violated the Arms Export Control Act, *Defense Distributed v. United States Department of State*, 838 F.3d 451, 455 (5th Cir. 2016) ("*Defense Distributed I*"), but "after a period of litigation, the parties reached a settlement agreement that granted Defense Distributed a license to publish its files." *Def. Distributed v. Grewal*, 971 F.3d 485, 488 (5th Cir. 2020) ("*Defense Distributed II*"). Not satisfied with the federal government's enforcement decision, New Jersey (and several other states) began a coordinated campaign of harassment against Defense Distributed with the goal of preventing publication that looks, in many respects, very similar to the one undertaken in New York. Defense Distributed claims that the New Jersey Attorney General:

> (1) sen[t] a cease-and-desist letter threatening legal action if Defense Distributed published its files; (2) sen[t] letters to third-party internet service providers based in California urging them to terminate their contracts with Defense Distributed; (3) initiat[ed] a civil lawsuit against

> Defense Distributed in New Jersey; and (4) threaten[ed] Defense Distributed with criminal sanctions at a live press conference.

Defense Distributed III, 30 F.4th at 422–23. It also initiated litigation against Defense Distributed in the Western District of Washington, securing injunctive relief preventing Defense Distributed from publishing its files, and succeeded in having the appeal of that decision dismissed as moot. *Washington v. Def. Distributed*, Nos. 20-35030, 20-35064, 2020 WL 4332902, at *1 (9th Cir. July 21, 2020). And through its tactics, including attempts to split ongoing litigation in Texas and transfer parts of the case to a federal court in New Jersey, it has has so far succeeded in preventing *any* appellate court from "condemning what appear to be flagrant prior restraints" on Defense Distributed's First Amendment protected speech. *Defense Distributed III*, 30 F.4th at 421.

By rejecting the Second Circuit's analysis below, this Court can send a strong message to such actors that violations of First Amendment rights are no more acceptable when they are directed against groups advocating for Second Amendment rights than in any other context.

CONCLUSION

For these reasons, the Court should reverse the judgment of the Second Circuit.

January 16, 2024

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