No. 25-479

IN THE

Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA,

Petitioner,

v.

MARIA T. VULLO,

Respondent.

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

BRIEF OF BUSINESS AND FINANCIAL LAW SCHOLARS AND INDEPENDENCE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

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1. Counsel of record received timely notice of this brief. No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, made any monetary contribution intended to fund the preparation or submission of this brief. The NRA Foundation, a legally separate entity from the NRA, has made contributions to the Independence Institute, although not specifically for this brief.

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Founded in 1985 on the eternal truths of the Declaration of Independence, the Independence Institute is a 501(c)(3) public policy research organization based in Denver, Colorado.

Amici are interested in this case because it involves a financial regulator abusing its power intentionally to target political enemies' access to financial services to deny them their constitutional rights.

SUMMARY OF THE ARGUMENT

The court below erred in holding that Superintendent Vullo was entitled to qualified immunity on the ground that it was impossible for her to foresee that third-party coercion could impact Petitioner's First Amendment rights. The court ignored what is obvious to financial regulators and the regulated: enterprises of scale cannot exist without the financial services Vullo targeted, and cutting off those services will necessarily cripple organizational speech.

The National Rifle Association (NRA) engages in Second Amendment advocacy. Vullo made clear that this advocacy motivated her to target the NRA's access to financial services. She knew the impact her actions would have on the NRA's financial partners, and thus the NRA's ability to speak freely. She did this by deliberately exploiting a regulatory environment in which regulated entities feel bound to follow even purportedly non-binding statements by their regulators.

ARGUMENT

In granting Vullo qualified immunity, the court below failed to account for the deliberate and repeated nature of the actions aimed at destroying the NRA's ability to access financial services, and thus engage in its advocacy mission. Vullo, working in concert with and under the direction of then-Governor Andrew Cuomo, publicly declared that the New York Department of Financial Services (NYDFS) would financially destroy the NRA. She then engaged in a series of calculated coercive acts to do so.

Qualified immunity should not insulate officials from the intended consequences of their premeditated malicious behavior. By inventing a distinction between coercion of third parties who provide conduits of speech (e.g., publishers) from coercion of third parties who provide other speech-enabling services (e.g., banks and insurers), the court below ignored that both are essential for advocacy organizations to function.

The unique relationship between financial regulators and their regulated firms tends to make those firms feel bound, on penalty of sanction. Regulated firms have historically faced formal and informal penalties for failure to conform to guidance that was nominally non-binding.

Vullo leveraged the imbalance of regulatory power to exert pressure on the NRA through the entities she regulated, which felt compelled to do her will. This Court should review the decision below.

I. Banks and insurance firms are subject to a uniquely vague and opaque regulatory environment.

Banking and insurance are vital services without which it is practically impossible to function in the modern economy.[2] Yet banks and insurers are subject to a regulatory regime that enables regulators to exercise significant discretion with very limited transparency.[3] Regulators are able to impose control upon regulated firms that can make the regulators into de facto co-managers of the firm—for example, deciding what lawful products they offer or not,[4] deciding whether banks can

2. *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 327 (1963) ("[T]he proper discharge of [banking operations] is indispensable to a healthy national economy . . . ."); United States v. Se. Underwriters Ass'n, 322 U.S. 533, 540 (1944) ("Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business."); George A. Mocsary, *Administrative Browbeating and Insurance Markets*, 68 Vill. L. Rev. 579, 582-87 (2023) (importance of insurance); Brian Knight & Trace Mitchell, *Private Policies and Public Power: When Banks Act as Regulators Within a Regime of Privilege*, 13 N.Y.U. J.L. & Liberty 66, 132-33 (2020) (importance of banking).

3. *See Guidance, Supervisory Expectations, and the Rule of Law: How Do the Banking Agencies Regulate and Supervise Institutions?: Hearing Before the S. Comm. on Banking, Hous., and Urb. Affs.*, 116th Cong. 36 (2019) (statement of Margaret E. Tahyar, Partner, Davis Polk and Wardwell LLP) ("[Bank] [s]upervision happens behind closed doors. It relies on secrecy and involves a system of discretionary actions by supervisory staff."); Mocsary, *supra* note 2, at 588-89 (insurance regulation's opacity and limited political accountability); Julie Hill, *Regulating Bank Reputation Risk*, 54 Ga. L. Rev. 523, 568-70 (2020).

4. Hill, *supra* note 3, at 576-78 (aggressive efforts by the Federal Deposit Insurance Corporation (FDIC) to discourage

open or change locations,[5] whether they can do business at all, whether to remove the firms' directors and officers, and even ban them from the industry.[6]

Regulators actively monitor firms for current and future compliance, rather than merely react to perceived problems.[7] Examination and supervision are usually done confidentially, with conversations and the determinations made by supervising regulators remaining out of public view.[8]

1. *Reputation Risk.* Since the mid-1990s, bank and insurance regulators have largely adopted a "risk-focused" regulatory approach where regulators monitor firms for

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banks from offering tax refund anticipation loans, a lawful product disfavored by regulators); Mocsary, *supra* note 2, at 593-94 (efforts by an insurance regulator to force coverage of uninsured induced earthquakes, and then to force the offering of "enhanced earthquake coverage").

5. 12 C.F.R. §§ 5.30-5.31; N.Y. Banking Law §§ 28, 29 (McKinney).

6. 12 U.S.C. § 1818; N.Y. Ins. Law § 1102(d) (McKinney 2025); N.Y. Banking Law § 41 (McKinney 2025); N.Y. Comp. Codes R. & Regs. tit. 3, §§ 2.2, 2.4 (2025); Knight & Mitchell, *supra* note 2, at 75-82 (government-imposed barriers to entry in banking).

7. Randal K. Quarles, Vice Chair, Bd. of Governors of the Fed. Rsrv. Sys., Law and Macroeconomics: The Global Evolution of Macroprudential Regulation, Address at Geo. Univ. L. Ctr. (Sept. 27, 2019), https://www.federalreserve.gov/newsevents/speech/quarles20190927a.htm.

8. *Guidance, Supervisory Expectations, and the Rule of Law*, *supra* note 3.

business-and-stability threatening risks.[9] In addition to obvious risks like credit and legal risk, regulators monitor banks' "reputation risk." The definition varies somewhat by regulator, and the concept is broad. For example, the Office of the Comptroller of the Currency states that reputation risk includes "risk to [the bank's] current or projected financial condition and resilience arising from negative public opinion."[10] The relevant audience for assessing risk to a bank's reputation includes not only customers, but also "shareholders, regulators, … other stakeholders, and the community at large."[11] The Federal Reserve does not list specific audiences but states that "[r]eputational risk is the potential that negative publicity regarding an institution's business practices, *whether true or not*, will cause a decline in the customer base, costly litigation, or revenue reductions."[12] These definitions are sweeping and vague, and provide significant discretion to examiners.

Despite, or perhaps because of, the inherent vagueness, the concept of reputation risk has permeated federal banking regulatory guidance.[13] It has expanded

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9. Hill, *supra* note 3, at 544-46 (rise of risk-based regulation).

10. Off. of the Comptroller of the Currency, Comptroller's Handbook: Safety and Soundness, Corporate and Risk Governance 4 (2019).

11. *Id.*

12. Bd. of Governors of the Fed. Rsrv. Sys., SR 95-51, Rating the Adequacy of Risk Management Processes and Internal Controls at State Member Banks and Bank Holding Companies (Nov. 4, 1995) (emphasis added).

13. Hill, *supra* note 3, at 549-53 (reputation risk's proliferation in federal banking regulation).

to include not only reputation risk caused by the bank's conduct, but also by the bank's customers, on the theory that a controversial customer—even one who does nothing illegal—may alienate other constituencies and harm the bank's financial position.[14]

Reputation risk is also unique in that there need not be a concrete triggering event to which regulators can point, and regulators themselves acknowledge that reputation risk is not objective—unlike legal or credit risk.[15] "Reputation risk" can stem from the regulators' assertions about the supposed future perceptions of customers, potential customers, and others with influence.

At the federal level, reputation risk is usually raised in regulatory guidance rather than codified in a rule or statute.[16] This means that enforcement actions targeting reputation risk would generally need to be tied to an "unsafe or unsound" practice to have a legal basis.[17]

Unfortunately, "unsafe or unsound" is not a meaningful check. Federal bank regulators have asserted a broad definition that includes any action or nonaction posing an "abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds," even if the loss would not imperil the institution.[18]

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14. *Id.* at 552.

15. *Id.* at 547-48.

16. *Id.* at 557.

17. *Id.* at 557-58.

18. *Id.* at 558 (quoting *Financial Institutions Supervisory and Insurance Act of 1966: Hearings on S. 3158 and S. 3695 Before*

Courts are divided on how broadly "unsafe and unsound" is defined in federal law. Although the Third, Fifth, and D.C. Circuits have narrowed the definition to encompass only risks that threaten bank stability,[19] the Second, Eighth, and Eleventh Circuits have embraced the broader standard advocated by federal regulators—i.e., any "abnormal risk."[20] Given the Second Circuit's outsized influence in matters of finance, its broad approach to allowing such investigations is significant.

Taken together, regulators can launch investigations into institutions' "reputation risk" premised only on how the regulators purport to *perceive* public opinion about the institution and its customers; often there is no meaningful consideration of whether that "risk" actually affects the institution's financial soundness. The "reputation" cudgel is used against entities or individuals who, whatever their public approval, are unpopular with the regulator.

The regulatory structure also discourages regulated firms from challenging their regulators and makes it hard to point to a concrete act that could give rise to a discrete legal challenge. Because banks and insurance firms are locked into ongoing supervisory relationships with their regulators, they know that resistance to the regulator on one topic may result in informal and painful

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the H. Comm. on Banking and Currency, 89th Cong. 50 (1966) (memorandum submitted by John Horne, Chairman, Fed. Home Loan Bank Bd.)).

19. *Id.* at 558-60.

20. *Id.* at 560.

later reprisal.[21] The regulator can make the regulatory process itself the punishment. This makes it difficult or impossible to challenge in court. Moreover, a lawsuit would only further alienate the regulator.

Additionally, there is no reason to expect regulators to be able to identify "reputation risk."[22] Insurers are risk experts whose success depends on managing risks well.[23] They are aware of the risks involved with entering a given market space.[24] More still, although banks and insurers routinely interact with myriad constituencies involved with their businesses, regulators rarely do.[25] That puts the regulated firms into an advantaged position vis-à-vis their regulators to determine whether serving a particular constituency is likely to be reputationally beneficial, harmful, or irrelevant.[26] Indeed, the Superintendent's pressuring and forcing, via letters and consent orders, insurers to stop doing business with Petitioner and other "gun promotion organizations"[27] may have hurt the

21. *Id.* at 579-83 (discussing Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 Yale J. Reg. 165, 174 (2019)).

22. *Id.* at 531-32; *accord* Mocsary, *supra* note 2, at 610-12.

23. Mocsary, *supra* note 2, at 610-11. So are banks, inasmuch as they regularly have to gauge the risks involved with loans and other investments.

24. *Id.*

25. *Id.* at 612.

26. *Id.*

27. Letter from Maria T. Vullo, Superintendent, N.Y. Dept of Fin. Servs., to the CEO or Equivalents of N.Y. State Chartered or Licensed Fin. Insts. (Apr. 19, 2018) [hereinafter Vullo Bank

insurers' financial soundness by decreasing demand for their products and causing them to be less diversified.[28]

2. *Opaque informal enforcement.* Because public enforcement actions are only a fraction of the universe of bank regulator interventions, many interventions occur outside public view.[29] Informal enforcement has also enabled significant regulatory abuse of the sort alleged in this case.[30]

While NYDFS is governed by New York rather than federal law, its regulation of banks and insurance companies has many parallels. NYDFS is tasked with ensuring that banks[31] and insurance[32] companies operate in a safe and sound manner. New York law grants NYDFS broad latitude to pursue this objective. For example,

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Letter], https://perma.cc/D2YT-HVKQ; Letter from Maria T. Vullo, Superintendent, N.Y. Dept of Fin. Servs., to the CEO or Equivalents of All Insurers Doing Business in the State of New York (Apr. 19, 2018) [hereinafter Vullo Insurance Letter], https://perma.cc/PDP7-JPSN; Consent Order Under Sections 1102 and 3420 of the Insurance Law, *In re* Chubb Grp. Holdings Inc. & Ill. Union Ins. Co. 6-7 (May 7, 2018), https://perma.cc/4CFE-RELT; Consent Order Under Articles 21, 23, and 34 of the Insurance Law, *In re* Lockton Affinity, LLC & Lockton Cos., LLC 12-13 (May 2, 2018), https://perma.cc/A4F2-RVQR.

28. Mocsary, *supra* note 2, at 611-12.

29. Hill, *supra* note 3, at 568-70.

30. *See infra* Part III.

31. N.Y. Banking Law § 14(q) (McKinney 2025).

32. N.Y. Ins. Law § 309 (McKinney 2025); *see also* Robert H. Jerry, II & Douglas R. Richmond, Understanding Insurance Law §§ 20, 22 (5th ed. 2012).

NYDFS's Superintendent has the discretion to refuse to grant an insurance license if she does not believe that granting a license would be in the best interest of New Yorkers.[33] Likewise, the Superintendent may reject a request to form a bank under the laws of New York if she believes the bank would not promote the "public convenience and advantage."[34]

This significant power continues after initial permission is granted. For example, NYDFS has broad authority to examine banks[35] and insurance companies.[36] It also uses the concept of reputation risk in its regulation of banks and insurance firms.[37] In fact, reputation risk was explicitly highlighted in the industry letters sent by NYDFS asking banks and insurance firms to evaluate their relationships with the NRA and other "gun promotion organizations."[38]

Thus, just as with federal regulators, NYDFS can directly invoke regulatory power simply because financial institutions serve customers that can be cast as unpopular or with whom the State's or NYDFS's leadership disagrees on policy matters.[39]

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33. N.Y. Ins. Law § 1102(d) (McKinney 2025).

34. N.Y. Banking Law § 24 (McKinney 2025).

35. *Id.* § 36.

36. N.Y. Ins. Law § 309 (McKinney 2025).

37. Hill, *supra* note 3, at 553-56.

38. Vullo Bank Letter, *supra* note 27; Vullo Insurance Letter, *supra* note 27.

39. *E.g.*, Press Release, Governor Andrew M. Cuomo, Governor Cuomo Directs Department of Financial Services to

The potential for abuse is illustrated by the barely veiled threats in the guidance memoranda sent by Vullo to New York banks and insurers instructing them to manage "reputational risks"[40] resulting from their dealings with the NRA and other gun-rights advocacy groups. The message was clear: to remain in NYDFS's good graces, banks and insurers must deny service to Second Amendment groups.

If a government entity had threatened the printers or website hosts used by the NRA to disseminate its speech, the NRA's ability to communicate to its members and the public would have been impaired and qualified immunity would not have been available under the reasoning of the opinion below. Much worse were the threats to the NRA's banks and insurers, which threats had the stated objective of making it impossible for the NRA to exist at all.

Urge Companies to Weigh Reputational Risk of Business Ties to the NRA and Similar Organizations (Apr. 19, 2018), https://perma.cc/DLK3-7S5K ("Governor Andrew M. Cuomo today directed the Department of Financial Services to urge insurance companies … in New York to review any relationships they may have with the National Rifle Association and other similar organizations."). New York courts also upheld a New York financial regulator's decision to liquidate an organization on the basis of public hazard because it "operated as an arm of the Communist party." *In re* Int'l Workers Order, Inc., 113 N.Y.S.2d 755, 761 (App. Div. 1952).

40. *See* Vullo Bank Letter, *supra* note 27; Vullo Insurance Letter, *supra* note 27.

II. The nature of banking and insurance regulation encourages regulated firms to feel bound by guidance and subject to sanction for noncompliance.

Banking and insurance face unique regulatory structures and incentives that cause firms to treat regulatory "guidance" as binding. As such, there is often an implied threat of sanction even when agency guidance lacks an explicit threat. Banks or insurers would thus reasonably believe that failure to comply with NYDFS guidance would result in some sort of punishment, either formally or informally.

For example, a study for the Administrative Conference of the United States (ACUS) found that in the context of federal regulation, regulated parties "often face overwhelming practical pressure to follow what a guidance document 'suggests.'"[41] It notes that banks are likely to find themselves bound by guidance because they are so dependent on maintaining good relationships with their regulators.[42] Banks need regulator approval to engage in basic business activities, like opening branches, and are subject to regular regulator examination. Because perfect regulatory compliance is impossible, banks fear that not following guidance will make regulators less cooperative on other regulatory matters.[43]

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41. Parrillo, *supra* note 21, at 174; *see also* Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective,* Admin. Conf. of the U.S. (Oct. 12, 2017).

42. Parrillo, *supra* note 21, at 192.

43. *Id.* at 192-95.

This problem is exacerbated by the strong incentive for entities not to challenge regulator decisions because the regulator can "'make life miserable' for a bank in all sorts of ways"[44] that do not necessarily involve a formal enforcement action. In short, bank regulators fully understand that they can control bank behavior by merely "raising an eyebrow."[45]

Informed by this study, ACUS promulgated a recommendation on how agencies could avoid giving the impression that their guidance statements were legally binding.[46] By one recommendation, an agency's statement should prominently disclaim that it was binding and explicitly state that the target of the guidance could take alternative lawful approaches.[47] Although the ACUS recommendation is nonbinding and not directly aimed at state regulators like NYDFS, it is noteworthy that NYDFS's statements lacked language comparable to the ACUS recommendation.[48] Quite the opposite, Vullo's

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44. *Id.* at 195; Hill, *supra* note 3, at 579-83.

45. Parrillo, *supra* note 21, at 195; *see also* Hill, *supra* note 3, at 581-82.

46. Admin. Conf. of the U.S., Administrative Conference Recommendation 2017-5, Agency Guidance Through Policy Statements (Dec. 14, 2017), https://www.acus.gov/sites/default/files/documents/Recommendation%2020175%20%28Agency%20Guidance%20Through%20Policy%20Statements%29_2.pdf.

47. *Id.* at 7.

48. Rare is the regulator that would so honestly disclaim its own asserted powers. The exception that proves the rule is the 15-month period from October to 2019 to January 2021 during which Executive Order 13,891 was in effect, which "require[d] that

letters were written in a "'zealous tone'" that villainized her political enemies who were customers of entities regulated by NYDFS.[49]

NYDFS's leader and her boss, the Governor, publicly expressed their animus toward the NRA. For example, Governor Cuomo, who appointed Vullo and instructed her to write the guidance memoranda, was clear: "New York is forcing the NRA into financial crisis. It's time to put the gun lobby out of business. #BankruptTheNRA" and "The regulations NY put in place are working. We're forcing the NRA into financial jeopardy. We won't stop until we shut them down."[50] Banks and insurers understood what was being demanded of them.[51]

[federal] agencies treat guidance documents as non-binding both in law and in practice." *See* Exec. Order No. 13,891, § 1, 84 Fed. Reg. 55,235 (Oct. 15, 2019), *revoked by* Exec. Order No. 13,992, 86 Fed. Reg. 7,049 (Jan. 25, 2021).

49. Mocsary, *supra* note 2, at 596-97; *see id.* at 595, 616-20.

50. Cuomo, *supra* note 39; Andrew Cuomo (@andrewcuomo), Facebook (Aug. 4, 2018) (emphasis added), https://www.facebook.com/andrewcuomo/posts/10155989594858401 [https://perma.cc/LU9Q-H7YC; Andrew Cuomo (@andrewcuomo), Facebook (Aug. 4, 2018), https://www.facebook.com/andrewcuomo/posts/10155987290088401 [https://perma.cc/BH82-FGUR].

51. *See* Neil Haggerty, *Gun Issue Is a Lose-Lose for Banks (Whatever Their Stance)*, Am. Banker (Apr. 26, 2018), https://www.americanbanker.com/news/gun-issue-is-a-lose-lose-for-banks-whatever-their-stance (anonymous banker opining that Vullo was "threatening regulatory sanctions" via her memoranda).

III. Prior incidents in banking and insurance regulation make clear that failing to adhere to guidance could result in sanction.

Banks and insurance firms that have failed to adhere to nominally nonbinding guidance have repeatedly suffered reprisal at the hands of their regulators. These incidents generated sufficient controversy that regulators, bankers, and insurance companies were well aware of them by the time NYDFS released its guidance regarding the NRA and "other gun promotion organizations." The lessons from these incidents would have colored regulated firms' assessment of whether they would face sanction for failing to comply with NYDFS's "guidance."[52] This is especially so with NYDFS, "widely viewed as one of the nation's most aggressive state regulators."[53]

1. *Revenue Anticipation Loans.* To see how banking regulators can use "guidance" to eliminate a business that Congress chose not to outlaw, consider the Federal Deposit Insurance Corporation's (FDIC's) recent success in using risk, including "reputation risk," as a justification to pressure banks to stop offering refund anticipation loans (RALs) to consumers and to stop providing banking services to so-called "payday lenders." In both cases, the FDIC could not prohibit the banks' conduct outright but instead relied on guidance combined with "moral suasion" and ratcheting up the intensity of supervisory and examination activities to "persuade" the banks that

52. Mocsary, *supra* note 2, at 597 nn.96-98.

53. Kristin Broughton, *Bad Actors, Beware: N.Y. Gov. Cites Wells Fargo in Calling for 'Bold Steps,'* Am. Banker, Feb. 1, 2017, at 8.

it was not in their best interest to maintain relationships with the disfavored industries.[54]

RALs are lawful but became unpopular with the executive branch after advocacy organizations lobbied FDIC leadership in 2008.[55] The FDIC began pressuring the handful of banks that provided the service to stop.[56] As the FDIC's Office of the Inspector General (OIG) notes, because RALs were legal, FDIC staff relied on "risk management" as a justification to engage the banks. According to the OIG, the justification for discouraging RALs "morphed over time."[57] The FDIC promulgated no rule or guidance related to RALs, but instead used "more generic guidance" as the standard to which they sought to hold banks.[58]

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54. *See* Off. of Inspector Gen., Fed. Deposit Ins. Corp., Report No. OIG-16-001, Report of Inquiry into the FDIC's Supervisory Approach to Refund Anticipation Loans and the Involvement of FDIC Leadership and Personnel iii-iv (Feb. 2016) [hereinafter FDIC OIG Report No. OIG-16-001] (the FDIC OIG did not release the full report because it contained "sensitive information"); Off. of Inspector Gen., Fed. Deposit Ins. Corp., Report No. AUD-15-008, The FDIC's Role in Operation Choke Point and Supervisory Approach to Institutions and Conducted Business with Merchants Associated with High-Risk Activities *passim* (Sept. 2015) [hereinafter FDIC OIG Report No. AUD-15-008].

55. Hill, *supra* note 3, at 533 n.49 (citing FDIC OIG Report No. OIG-16-001, *Id.* at i & n.2).

56. FDIC OIG Report No. OIG-16-001, *supra* note 54, at i-ii.

57. *Id.* at ii.

58. *Id.*

The FDIC ultimately succeeded in driving banks out of the RAL market, [59] but only through what the OIG described as "unprecedented efforts to use the FDIC's supervisory and enforcement powers" and the "circumvention of certain controls surrounding the exercise of enforcement powers."[60]

The OIG found that FDIC officials in Washington directed staff to lower the Safety and Soundness report ratings of banks offering RALs, with the downgrade being predetermined before examination in at least one case.[61] The OIG also found that FDIC officials refused to accept a risk analysis that showed banks' ability to mitigate risk and that those same officials reworked the analysis until they got their desired result.[62] The FDIC prohibited a bank from pursuing its desired strategy of buying failed institutions unless it discontinued offering RALs.[63]

Additionally, the FDIC used its supervisory authority as a stick to gain compliance. An FDIC attorney "abusively" threatened the banks' leadership—in one instance telling a bank's board that "nothing would be off the table" if it refused to cease offering RALs.[64] This included the use of "extraordinary examination resources," where over four

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59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at iii.

63. FDIC OIG Report No. AUD-15-008, *supra* note 54, at 38.

64. FDIC OIG Report No. OIG-16-001, *supra* note 54, at iii; FDIC OIG Report No. AUD-15-008, *supra* note 54, at 39.

hundred examiners would examine banks that offered RALs and their tax preparer partners, in an effort to find violations the FDIC could use to justify punishing banks that refused to abide by the FDIC's supposedly nonbinding "guidance."[65]

Although there was a lack of "examination-based evidence of harm caused by RAL programs," the FDIC's tactics prevailed, and as the OIG noted, significantly harmed the target banks, including their actual reputations.[66]

The FDIC's actions against banks offering RALs demonstrate many of the factors already discussed[67] for why firms often feel bound by informal guidance. The FDIC prevented one bank from pursuing an unrelated business plan by withholding permission unless the bank complied with guidance. The FDIC also leveraged its examination power to intimidate and punish banks that considered treating its "guidance" as nonbinding.[68]

The efforts of FDIC officials to make banks cut ties with disfavored industries, especially payday lending, did not stop at "guidance." Several FDIC officials used "moral suasion" to discourage banks from doing business with payday lenders, despite recognizing that there was no

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65. FDIC OIG Report No. OIG-16-001, *supra* note 54, at iii; FDIC OIG Report No. AUD-15-008, *supra* note 54, at 39.

66. FDIC OIG Report No. OIG-16-001, *supra* note 54, at ii.

67. *See supra* notes 44-48 and accompanying text.

68. FDIC OIG Report No. OIG-16-001, *supra* note 54, at ii-iii; FDIC OIG Report No. AUD-15-008, *supra* note 54, at 38-40.

legal ground to force the banks to quit the relationships.[69] In at least one case, an FDIC Regional Director directly told a bank that partnering with a payday lender was generally "unacceptable for an insured [] institution," despite there being no legal prohibition against it,[70] as an FDIC official later acknowledged.[71] Although the bank's state regulator had no objection to the arrangement, the bank opted to terminate its relationship with the payday lender.[72] In a letter to the FDIC Chicago Regional Office, the bank's CEO criticized the FDIC's use of supervision as a tool to pressure the bank to end a business relationship without there being identified risks to the bank's safety and soundness other than purported reputation risk.[73]

2. *Operation Choke Point.* Following the RAL controversy, the FDIC became embroiled in the infamous

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69. Hill, *supra* note 3, at 575-76; FDIC OIG Report No. AUD-15-008, *supra* note 54, at 23-28.

70. Letter from M. Anthony Lowe, Reg'l Dir., Chi. Reg'l Off., Fed. Deposit Ins. Corp., to Bd. of Dirs. of [name redacted], FDIC-ICR-0085 (Feb. 15, 2013), *reprinted in* Staff of Subcomm. on Econ. Growth, Job Creation, and Regulatory Affairs, H. Comm. on Oversight and Gov't Reform, 113th Cong., Federal Deposit Insurance Corporation's Involvement in "Operation Choke Point" app. 121 (Comm. Print 2014), https://republicans-oversight.house.gov/wpcontent/uploads/2014/12/Appendix-1.pdf [hereinafter H. Comm. Rep. on Operation Choke Point].

71. FDIC OIG Report No. AUD-15-008, *supra* note 54, at 27 ("In the end, we are getting them out of [ACH processing for a payday lender] through moral persuasion and as you know from a legal perspective we don't have much of a position, if any.").

72. *Id.* at 27-28.

73. *Id.* at 27.

"Operation Choke Point." Operation Choke Point began as a Department of Justice (DOJ) initiative to get banks and payments processors to cut off fraudulent companies' access to the Federal Reserve's payments system.[74] While the exact degree of the FDIC's direct involvement in DOJ's operation is disputed,[75] it is clear that FDIC guidance was used by DOJ. At a minimum, DOJ included with its subpoenas to banks a copy of the FDIC's Financial Institution Letter (FIL) FIL-3-2012. This document discussed alleged risks posed to banks from relationships with payment processors that served certain industries.[76] The FDIC guidance included a footnote with what it claimed was a non-exclusive list of industries that may have a higher incidence of fraud, including firearms, payday loans, and tobacco.[77] The guidance did not explain the FDIC's methodology or how it arrived at the list of industries.

Roughly contemporaneously with DOJ's efforts, the FDIC engaged in its own efforts to influence banks' customer choices. Before the previously mentioned

74. Hill, *supra* note 3, at 572; FDIC OIG Report No. AUD-15-008, *supra* note 54, at 1.

75. *Compare* FDIC OIG Report No. AUD-15-008, *supra* note 54, at ii ("FDIC's involvement in Operation Choke Point [was] inconsequential to the overall direction and outcome of the initiative."), *with* H. Comm. Rep. on Operation Choke Point, *supra* note 70, at 15-16, https://republicans-oversight.house.gov/report/federaldepositinsurancecorporations-fdic-involvement-operation-choke-point (alleging active partnership between DOJ and FDIC).

76. H. Comm. Rep. on Operation Choke Point, *supra* note 70, at app. 141.

77. *Id.* at app. 141 n.1.

guidance, the FDIC ran an article in its *Supervisory Insights* magazine that discussed risks posed to banks by third-party relationships.[78] The article identified some general criteria for what may constitute a high-risk payment.[79] The article then provided a nonexclusive list of thirty merchant categories that it identified as being associated with high-risk activities—including firearms, coin dealers, and payday loans.[80]

Shortly after the release of these guidance documents, banks began dropping customers in the allegedly high-risk industries.[81] It is disputed whether the FDIC intended to use the high-risk list to motivate banks to cut ties with payments processors who served those industries.[82]

But the *effect* of discouraging banks from serving industries on the high-risk list is undisputed.[83] The FDIC acknowledged as much because it revised its summer 2011 *Supervisory Insights* journal article[84] to remove the list of

78. *Id*. at app. 152.

79. *Id.* at app. 155-56.

80. *Id*. at app. 156.

81. Hill, *supra* note 3, at 573-74.

82. *Compare* FDIC OIG Report No. AUD-15-008, *supra* note 54, at 17, *with* H. Comm. Rep. on Operation Choke Point, *supra* note 70, at 3-7.

83. FDIC OIG Report No. AUD-15-008, *supra* note 54, at 19; H. Comm. Rep. on Operation Choke Point, *supra* note 70, at 7.

84. H. Comm. Rep. on Operation Choke Point, *supra* note 70, at app. 152.

high-risk industries.[85] It also published new and revised guidance to make clear that banks that can manage the risk posed by a lawful relationship are not prohibited from doing business.[86]

3. *Insurance.* Insurers, too, can be easily coerced by regulatory "guidance." In March 2015, for example, the Oklahoma Insurance Commissioner issued a bulletin regarding earthquake insurance.[87] Oklahoma had seen an increase in earthquakes that the U.S. Geological Survey, Oklahoma Geological Survey, and others attributed to injection of wastewater as part of oil and gas extraction (i.e., fracking).[88] Most earthquake policies sold at the time excluded damage from "man-made" earthquakes.[89]

The Commissioner's bulletin asserted that there was "no agreement at a scientific or government level"

85. FDIC OIG Report No. AUD-15-008, *supra* note 54, at 19.

86. *Id.* (citing Fed. Deposit Ins. Corp., FIL-41-2014, FDIC Clarifying Supervisory Approach to Institutions Establishing Account Relationships with Third-Party Payment Processors (July 28, 2014), and Fed. Deposit Ins. Corp., FIL-43-2013, FDIC Supervisory Approach to Payment Processing Relationships with Merchant Customers that Engage in Higher-Risk Activities (Sept. 27, 2013, *revised* July 2014)).

87. John D. Doak, Okla. Ins. Comm'r, Okla. Ins. Dep't, Earthquake Ins. Bull. No. PC 2015-02, Earthquake Insurance, Excluded Loss, Inspection of Insured Property and Adjuster Training (Mar. 3, 2015), https://www.oid.ok.gov/wpcontent/uploads/2019/10/030415_Earthquake-Bulletin-3-3-15.pdf [https://perma.cc/GCX8-J9ZJ] [hereinafter Doak Bulletin].

88. Mocsary, *supra* note 2, at 591-92.

89. *Id.* at 592.

about whether fracking caused the quakes.[90] The bulletin contained no explicitly binding language, but noted that the Commissioner was concerned that insurers might be denying claims on the basis of the "unsupported belief" that fracking was responsible. The Commissioner warned that insurers denying such claims should expect "appropriate action to enforce the law."[91] The bulletin also announced that the Oklahoma Insurance Commissioner's Office would pursue market conduct examinations to investigate the high rates of coverage denials,[92] restated the Insurance Commission's duty to determine whether insurers were "employing fair claims practices," and expressed an expectation that adjusters would receive adequate training in earthquake claims.[93]

In the bulletin's wake, premiums for earthquake insurance increased 260%, deductibles increased, and the number of insurers who offered earthquake insurance declined.[94] This is compelling evidence that insurers in Oklahoma believed they had to pay what might be uninsured claims or else face regulatory sanction through examination. Scholars have collected examples like these from across the country.[95]

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90. Doak Bulletin, *supra* note 87; Mocsary, *supra* note 2, at 593.

91. Doak Bulletin, *supra* note 87.

92. *Id.*

93. *Id.*; Mocsary, *supra* note 2, at 593.

94. Mocsary, *supra* note 2, at 594.

95. *Id.* at 590 n.52 (citing examples from California, seven northeastern states, at least three other unidentified states, over a span of a decade or more).

IV. The Court should reverse the Second Circuit.

The court below granted Vullo qualified immunity by drawing tenuous distinctions between the facts of Vullo's case and this Court's precedents. Necessarily, officials in Vullo's position—and, as demonstrated, Vullo herself—know that they impede the constitutionally protected speech of third parties by pressuring regulated entities, in violation of *Bantam Books*[96] and its progeny.

The concerns expressed by this Court in *Bantam Books* are amplified in the financial services context. The Second Circuit, by holding that Vullo's "facially valid law enforcement against a third-party associate" was so "attenuated" a violation of the First Amendment that it was entitled to qualified immunity,[97] ignored how Vullo willfully deployed her regulatory power to coerce banks and insurers to disable the NRA's speech by stripping the NRA of their services.

There is a growing effort by financial regulators to use their awesome powers to effect social change, even at the expense of protected constitutional rights. Financial services are essential to participating in the modern economy, and financial regulators have expansive, opaque power over the firms they regulate. Regulators, those whom they regulate, and the public writ large have recognized that financial regulations can be used as a tool to drive broader societal change outside the legislative

96. Bantam Books v. Sullivan, 372 U.S. 58 (1963).

97. Nat'l Rifle Ass'n of Am. v. Vullo, 144 F.4th 376, 395-96 (2d Cir. 2025).

process.[98] The legitimate delegated power of a regulator to protect financial safety and soundness should not be used to eliminate lawful businesses or prevent the exercise of constitutional rights.

This particular case involving NYDFS and the NRA is one of many examples of regulators abusing their unique positions of trust and power for political, rather than *bona fide* regulatory, purposes. Unless such willful and egregious misuse is curtailed, Superintendent Vullo will not be the last regulator who attempts to evade the First Amendment by doing "indirectly what she is barred from doing directly."[99] As one scholar generally opposing gun rights once said, "What someone does to the NRA today someone else will do to Planned Parenthood tomorrow."[100]

The Court should address this recurring matter of great significance.

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98. Hill, *supra* note 3, at 533 n.49 (FDIC's crackdown on RALs began after consumer advocates sent a letter to FDIC Chairman Shelia Bair calling such loans harmful to consumers); *see also* Jonathan Stempel, *New York Governor Presses Banks, Insurers to Weigh Risk of NRA Ties*, Reuters (Apr. 19, 2018), https://www.reuters.com/article/us-usa-guns-new-york/new-york-governor-presses-banks-insurers-to-weigh-risk-of-nra-ties-idUSKBN1HR04P (Governor Cuomo saying, "[t]his is not just a matter of reputation, it is a matter of public safety").

99. Nat'l Rifle Ass'n of Am. v. Vullo, 602 U.S. 175, 190 (2024).

100. David B. Kopel et al., *Big Business as Gun Control*, 129 Dick. L. Rev. 851, 911 (2025).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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